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Legislative History – Montana Session Law

Chapter: 432

Session L: 2019

Checklist of Bill History

Bill Number:

HB286

History and Final Status Sheet



Introduced Bill



Fiscal Note



Third Reading Bill



Final Version of Bill



House	Senate
Committee: Natural Resources	Committee: Natural Resources
Hearing Date(s): 2/13/2019	Hearing Date(s): 3/8/2019
Committee Report: 2/22/2019	Committee Report: 4/3/2019

House Appropriations Committee

Hearing Date(s): 4/11/2019

Conference Committee Report: 4/12/2019

Compiler Notes

Compiled by: S.K. Marshall

Date: 4/2/2024

Notes:

Bill Draft Number: LC1387**Bill Type - Number:** HB 286**Short Title:** Revise water right laws related to state water claims**Primary Sponsor:** Alan Redfield (R) HD 59**Chapter Number:** 432**Bill Actions - Current Bill Progress:** Became Law**Bill Action Count:** 60

Action - Most Recent First	Date	Votes Yes	Votes No	Committee
Chapter Number Assigned	05/20/2019			
(H) Transmitted to Governor	05/01/2019			
(S) Signed by President	04/30/2019			
(H) Signed by Speaker	04/26/2019			
(C) Printed - Enrolled Version Available	04/16/2019			
(H) Returned from Enrolling	04/16/2019			
(H) Sent to Enrolling	04/15/2019			
(H) 3rd Reading Passed as Amended by Senate	04/15/2019	90	9	
(H) Scheduled for 3rd Reading	04/15/2019			
(H) Committee Report--Bill Passed	04/12/2019			(H) Appropriations
(H) Committee Executive Action--Bill Passed	04/12/2019	20	2	(H) Appropriations
(H) Hearing	04/11/2019			(H) Appropriations
(H) Rereferred to Committee	04/10/2019			(H) Appropriations
(H) 2nd Reading Senate Amendments Concurred	04/10/2019	91	9	
(H) Scheduled for 2nd Reading	04/10/2019			
(H) Revised Fiscal Note Printed	04/09/2019			
(S) Returned to House with Amendments	04/08/2019			
(S) 3rd Reading Concurred	04/08/2019	42	7	
(S) Scheduled for 3rd Reading	04/08/2019			
(C) Fiscal Note Unsigned	04/08/2019			
(H) Revised Fiscal Note Received	04/08/2019			
(S) 2nd Reading Concurred	04/05/2019	38	10	
(S) Scheduled for 2nd Reading	04/05/2019			
(H) Revised Fiscal Note Requested	04/04/2019			
(C) Printed - New Version Available	04/04/2019			
(S) Committee Report--Bill Concurred as Amended	04/04/2019			(S) Natural Resources
(S) Committee Executive Action--Bill Concurred as Amended	04/03/2019	8	4	(S) Natural Resources
(S) Hearing	03/18/2019			(S) Natural Resources
(S) Referred to Committee	03/08/2019			(S) Natural Resources
(S) First Reading	03/07/2019			
(H) Transmitted to Senate	02/27/2019			
(H) 3rd Reading Passed	02/27/2019	83	16	
(H) Scheduled for 3rd Reading	02/27/2019			
(H) 2nd Reading Passed	02/26/2019	83	16	
(H) Scheduled for 2nd Reading	02/26/2019			
(C) Printed - New Version Available	02/23/2019			
(H) Committee Report--Bill Passed as Amended	02/23/2019			(H) Natural Resources
(H) Committee Executive Action--Bill Passed as Amended	02/22/2019	13	2	(H) Natural Resources
(H) Hearing	02/13/2019			(H) Natural Resources
(H) Fiscal Note Printed	01/31/2019			
(H) Fiscal Note Signed	01/31/2019			
(H) Fiscal Note Received	01/30/2019			
(H) First Reading	01/24/2019			(H) Natural Resources
(H) Referred to Committee	01/24/2019			(H) Natural Resources
(H) Fiscal Note Requested	01/24/2019			
(C) Introduced Bill Text Available Electronically	01/23/2019			
(H) Introduced	01/23/2019			
(C) Draft Delivered to Requester	01/23/2019			
(C) Draft Ready for Delivery	01/22/2019			
(C) Executive Director Final Review	01/22/2019			
(C) Draft in Assembly	01/22/2019			
(C) Executive Director Review	01/21/2019			
(C) Bill Draft Text Available Electronically	01/21/2019			
(C) Draft in Final Drafter Review	01/21/2019			
(C) Draft in Input/Proofing	01/19/2019			
(C) Draft to Drafter - Edit Review [KWK]	01/19/2019			
(C) Draft in Edit	01/17/2019			
(C) Draft in Legal Review	01/16/2019			
(C) Draft to Requester for Review	01/16/2019			
(C) Draft Request Received	11/16/2018			

Sponsor, etc.**Sponsor, etc.** Last Name/Organization First Name MI

Requester	Redfield	Alan
Drafter	Hach	Corina
Primary Sponsor	Redfield	Alan

Subjects

Description	Revenue/Approp.	Vote Majority Req.	Subject Code
Rule Making	Simple		RUL
State Government	Simple		STGO
Water	Simple		WAT

Additional Bill Information

Fiscal Note Probable: Yes
Preintroduction Required: N
Session Law Ch. Number: 432
DEADLINE
Category: General Bills
Transmittal Date: 03/01/2019
Return (with 2nd house amendments) Date: 04/08/2019

Section Effective Dates

Section(s)	Effective Date	Date Qualified
All Sections	11-MAY-19	

HOUSE BILL NO. 286

INTRODUCED BY A. REDFIELD

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER RIGHT LAWS IN CONNECTION WITH STATE LAND LEASES; DECLARING THAT THE USE OF PRIVATE WATER RIGHTS DERIVED FROM A WELL OR DEVELOPED SPRING WHOSE DIVERSION WORKS IS LOCATED ON PRIVATE LAND FOR USE ON STATE LAND IN CONNECTION WITH A STATE LAND LEASE DOES NOT RESULT IN AN OWNERSHIP INTEREST IN THE STATE OF MONTANA; CREATING A NOTICE PROCEDURE FOR WATER RIGHTS HOLDERS WISHING TO USE PRIVATE WATER RIGHTS ON STATE LAND; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTION 85-2-306, MCA; AND PROVIDING EFFECTIVE DATES AND APPLICABILITY DATES."

WHEREAS, the use of water derived from a well or developed spring whose diversion works is not located on state-owned land to provide stock water on state-owned land is in the best interest of the state land lessee and the state; and

WHEREAS, the ability to manage livestock grazing and improve grazing management through the use of stock tanks is a benefit to state lands and the income received by the state from grazing leases; and

WHEREAS, the state of Montana asserting ownership over privately held water rights derived from a well or developed spring whose diversion works are located wholly on private land serves as a disincentive to improving grazing management on state-owned lands through the use of water tanks; and

WHEREAS, the Montana Water Court in Case No. 43A-A found that the temporary use of a privately owned water right on state land did not equate to state ownership of all or a part of the water right; and

WHEREAS, a water right that is diverted, developed, and perfected on private land is not subject to the holding in Department of State Lands v. Pettibone; and

WHEREAS, the right to use water is a property right that cannot be taken without due process of law.

THEREFORE, the Legislature of the State of Montana finds that the use of water from a well or developed springs that is diverted from a privately owned diversion works located on private land and utilized on state land does not create an ownership interest in the water right in the state of Montana.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

1

2 **NEW SECTION.** **Section 1. Temporary use of a water right on state-owned land.** (1) A water right
3 owner may put water from a well or developed spring whose diversion works is located on private land to
4 beneficial use on state-owned land for the duration of any state land lease held by the water right owner.

5 (2) The state of Montana does not obtain an ownership interest in a water right or the diversion works
6 of a water right that is diverted from a well or developed spring located on private land and placed to beneficial
7 use on state land in conjunction with a state land lease held by the water right owner.

8

9 **NEW SECTION.** **Section 2. Water right abstract reflecting temporary use of private water right**
10 **on state-owned land.** (1) A state land lessee who temporarily puts water to beneficial use on state land pursuant
11 to [section 1] shall submit a notice to the department containing:

12 (a) the legal description of the temporary place of use of the water right;
13 (b) the nature of the temporary beneficial use of the water right; and
14 (c) a statement that the maximum flow rate or volume indicated on the water right abstract will not be
15 increased.

16 (2) The department shall issue a temporary water right abstract with the information provided in
17 subsection (1).

18 (3) The water right owner shall notify the department when:

19 (a) the state land lease is no longer held by the water right holder; or
20 (b) the water right owner no longer intends to utilize the water right on the state land parcel.

21 (4) Upon receiving notification pursuant to subsection (3), the department shall designate the temporary
22 abstract as void and reissue the previous abstract showing that the state land parcel is not a place of use
23 associated with the subject water right. The department shall provide the water right owner with a copy of the
24 reissued abstract.

25

26 **NEW SECTION.** **Section 3. Rulemaking authority.** The department shall adopt rules to implement the
27 provisions of [section 2].

28

29 **Section 4.** Section 85-2-306, MCA, is amended to read:

30 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b), ground

1 water may be appropriated only by a person who has a possessory interest, including a lease, in the property
2 where the water is to be put to beneficial use and exclusive property rights in the ground water development
3 works.

4 (b) If another person has rights in the ground water development works, water may be appropriated with
5 the written consent of the person with those property rights or, if the ground water development works are on
6 national forest system lands, with any prior written special use authorization required by federal law to occupy,
7 use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation,
8 withdrawal, use, or distribution of water under the certificate.

9 (c) If the person does not have a possessory interest in the real property from which the ground water
10 may be appropriated, the person shall provide to the owner of the real property written notification of the works
11 and the person's intent to appropriate ground water from the works. The written notification must be provided to
12 the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are
13 proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice
14 requirement only and does not create an easement in or over the real property where the ground water
15 development works are located.

16 (2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

17 (a) according to a permit received pursuant to 85-2-508; or

18 (b) according to the requirements of a rule promulgated pursuant to 85-2-506.

19 (3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before
20 appropriating ground water by means of a well or developed spring:

21 (i) when the appropriation is made by a local governmental fire agency organized under Title 7, chapter
22 33, and the appropriation is used only for emergency fire protection, emergency fire training, and emergency
23 fire-related operations, which may include enclosed storage;

24 (ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive geothermal
25 heating or cooling exchange applications, all of the water extracted is returned without delay to the same source
26 aquifer, and the distance between the extraction well and both the nearest existing well and the hydraulically
27 connected surface waters is more than twice the distance between the extraction well and the injection well;

28 (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does
29 not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells
30 or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

1 (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does
2 not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells
3 or developed springs exceeding this limitation requires a permit.

4 (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water
5 for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the
6 department through its offices.

7 (ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate
8 of water right, return a defective notice for correction or completion, together with the reasons for returning it. A
9 notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the
10 department within 30 days of notification of defects or within a further time as the department may allow, not to
11 exceed 6 months.

12 (iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation
13 is the date of refiled a correct and complete notice with the department.

14 (c) A certificate of water right may not be issued until a correct and complete notice has been filed with
15 the department, including proof of landowner notification or a written federal special use authorization as
16 necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department
17 shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date
18 of priority of the right.

19 (4) An appropriator of ground water by means of a well or developed spring first put to beneficial use
20 between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force
21 prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in
22 subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is
23 sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing
24 of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

25 (5) An appropriation under subsection (4) is an existing right, and a permit is not required. However, the
26 department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that
27 for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall issue
28 a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the
29 adjudication proceedings provided for in 85-2-236.

30 (6) A permit is not required before constructing an impoundment or pit and appropriating water for use

1 by livestock if:

2 (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

3 (b) the appropriation is less than 30 acre-feet a year;

4 (c) the appropriation is from an ephemeral stream, an intermittent stream, or another source other than
5 a perennial flowing stream; and

6 (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned
7 or under the control of the applicant and that is 40 acres or larger.

8 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit
9 as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete application for a
10 stock water provisional permit, the department shall automatically issue a provisional permit. If the department
11 determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may
12 revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit
13 subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other
14 appropriators. [For purposes of an adverse effects determination under this subsection, the department may not
15 consider adverse effects on any water right identified in a written consent to approval filed pursuant to 85-2-311.]

16 (b) If the impoundment or pit is on national forest system lands, an application is not correct and
17 complete under this section until the applicant has submitted proof of any written special use authorization
18 required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,
19 impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

20 (8) A person may also appropriate water without applying for or prior to receiving a permit under rules
21 adopted by the department under 85-2-113.

22 (9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of
23 the Flathead Indian reservation. (Bracketed language in subsection (7)(a) terminates September 30, 2023--sec.
24 8, Ch. 243, L. 2017.)"

25
26 **NEW SECTION. Section 5. Codification instruction.** [Sections 1 through 3] are intended to be codified
27 as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [sections 1 through 3].

28
29 **NEW SECTION. Section 6. Effective dates.** (1) Except as provided in subsection (2), [this act] is
30 effective on passage and approval.

1 (2) [Section 2] is effective October 1, 2019.

2

3 **NEW SECTION.** **Section 7. Applicability -- retroactive applicability.** (1) [Section 2] applies to water
4 rights being used on leased lands on or after October 1, 2019.

5 (2) [Section 1] applies retroactively, within the meaning of 1-2-109, to water from a well or developed
6 spring whose diversion works is located on private land put to a beneficial use on state-owned land before [the
7 effective date of this act].

8

- END -

HOUSE BILL NO. 286

INTRODUCED BY A. REDFIELD

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER RIGHT LAWS IN CONNECTION WITH STATE LAND LEASES; DECLARING THAT THE USE OF PRIVATE WATER RIGHTS DERIVED FROM A WELL OR DEVELOPED SPRING WHOSE DIVERSION WORKS IS LOCATED ON PRIVATE LAND FOR USE ON STATE LAND IN CONNECTION WITH A STATE LAND LEASE DOES NOT RESULT IN AN OWNERSHIP INTEREST IN THE STATE OF MONTANA; ~~CREATING A NOTICE PROCEDURE FOR WATER RIGHTS HOLDERS WISHING TO USE PRIVATE WATER RIGHTS ON STATE LAND; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTION 85-2-306, MCA; AND PROVIDING EFFECTIVE DATES AND APPLICABILITY DATES~~ AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

WHEREAS, the use of water derived from a well or developed spring whose diversion works is not located on state-owned land to provide stock water on state-owned land is in the best interest of the state land lessee and the state; and

WHEREAS, the ability to manage livestock grazing and improve grazing management through the use of stock tanks ~~is a benefit to state lands and the income received by the state~~ GENERATES REVENUE TO THE STATE THROUGH INCREASED REVENUE from grazing leases; and

WHEREAS, the state of Montana asserting ownership over privately held water rights derived from a well or developed spring whose diversion works are located wholly on private land serves as a disincentive to improving grazing management on state-owned lands through the use of water tanks; and

WHEREAS, the Montana Water Court in Case No. 43A-A found that the temporary use of a privately owned water right on state land did not equate to state ownership of all or a part of the water right; and

WHEREAS, a water right that is diverted; AND developed; ~~and perfected~~ on private land is not subject to the holding in Department of State Lands v. Pettibone; and

WHEREAS, THE STATE OF MONTANA INCORRECTLY EXPANDED THE SCOPE OF DEPARTMENT OF STATE LANDS V. PETTIBONE TO INCLUDE ALL TRUSTS, NOT JUST SCHOOL TRUST LANDS; AND

WHEREAS, THE STATE OF MONTANA INCORRECTLY EXPANDED THE SCOPE OF DEPARTMENT OF STATE LANDS V. PETTIBONE TO ASSERT OWNERSHIP OVER WATER RIGHTS THAT WERE DIVERTED AND DEVELOPED ON PRIVATE LAND;

1 AND

2 WHEREAS, THE STATE OF MONTANA IS VIOLATING 85-2-306, MCA, IN ASSERTING OWNERSHIP OVER A GROUND
3 WATER DEVELOPMENT IN WHICH THE STATE DOES NOT HAVE EXCLUSIVE PROPERTY RIGHTS IN THE GROUND WATER
4 DEVELOPMENT WORKS; AND

5 WHEREAS, the right to use water is a property right that cannot be taken without due process of law.

6 THEREFORE, the Legislature of the State of Montana finds that the use of water from a well or
7 developed springs that is diverted from a privately owned diversion works located on private land and utilized on
8 state land does not create an ownership interest in the water right in the state of Montana.

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 (Refer to Introduced Bill)

12 Strike everything after the enacting clause and insert:

13
14 NEW SECTION. **Section 1. Temporary use of a water right on state trust land -- restrictions on**
15 **state ownership -- rescinding of noncompliant ownership interests required.** (1) A water right owner may
16 put water from a well or developed spring with ground water development works located on private land to
17 beneficial use on state trust land for the duration of a state land lease the water right owner holds.

18 (2) The state may not obtain an ownership interest in a water right or the ground water development
19 works of a water right that is diverted from a well or developed spring exclusively based on trustee obligations
20 for state trust land unless:

21 (a) the ground water development works are located on state trust land;

22 (b) all or part of the place of use of the water right is located on state trust land;

23 (c) the state owns exclusive property rights in the ground water development works; and

24 (d) other statutory requirements are met.

25 (3) Except as provided in subsection (2), the state may only acquire ownership interests in a water right
26 or ground water development works to satisfy trustee obligations for state trust land by exercising the right of
27 eminent domain pursuant to Title 70, chapter 30.

28 (4) Before September 30, 2019, the state shall rescind any claim of ownership it asserted or acquired
29 prior to [the effective date of this act] in a water right or ground water development works to satisfy trustee
30 obligations for state trust land that do not meet the requirements of subsections (2) or (3).

1 (5) For the purposes of this section, "state trust land" has the meaning provided in 77-1-101.

2
3 NEW SECTION. **Section 2. Codification instruction.** [Section 1] is intended to be codified as an
4 integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [section 1].

5
6 NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

7
8 NEW SECTION. **Section 4. Retroactive applicability.** [This act] applies retroactively, within the
9 meaning of 1-2-109, to water from a well or developed spring with ground water development works developed
10 prior to [the effective date of this act].

11 - END -

HOUSE BILL NO. 286

INTRODUCED BY A. REDFIELD

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER RIGHT LAWS IN CONNECTION WITH STATE LAND LEASES; DECLARING THAT THE USE OF PRIVATE WATER RIGHTS DERIVED FROM A WELL OR DEVELOPED SPRING WHOSE DIVERSION WORKS IS LOCATED ON PRIVATE LAND FOR USE ON STATE LAND IN CONNECTION WITH A STATE LAND LEASE DOES NOT RESULT IN AN OWNERSHIP INTEREST IN THE STATE OF MONTANA; ~~CREATING A NOTICE PROCEDURE FOR WATER RIGHTS HOLDERS WISHING TO USE PRIVATE WATER RIGHTS ON STATE LAND; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTION 85-2-306, MCA; AND PROVIDING EFFECTIVE DATES AND APPLICABILITY DATES~~ AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

WHEREAS, the use of water derived from a well or developed spring whose diversion works is not located on state-owned land to provide stock water on state-owned land is in the best interest of the state land lessee and the state; and

WHEREAS, the ability to manage livestock grazing and improve grazing management through the use of stock tanks ~~is a benefit to state lands and the income received by the state~~ GENERATES REVENUE TO THE STATE THROUGH INCREASED REVENUE from grazing leases; and

WHEREAS, the state of Montana asserting ownership over privately held water rights derived from a well or developed spring whose diversion works are located wholly on private land serves as a disincentive to improving grazing management on state-owned lands through the use of water tanks; and

WHEREAS, the Montana Water Court in Case No. 43A-A found that the temporary use of a privately owned water right on state land did not equate to state ownership of all or a part of the water right; and

WHEREAS, a water right that is diverted; AND developed; ~~and perfected~~ on private land is not subject to the holding in Department of State Lands v. Pettibone; and

WHEREAS, THE STATE OF MONTANA INCORRECTLY EXPANDED THE SCOPE OF DEPARTMENT OF STATE LANDS V. PETTIBONE TO INCLUDE ALL TRUSTS, NOT JUST SCHOOL TRUST LANDS; AND

WHEREAS, THE STATE OF MONTANA INCORRECTLY EXPANDED THE SCOPE OF DEPARTMENT OF STATE LANDS V. PETTIBONE TO ASSERT OWNERSHIP OVER WATER RIGHTS THAT WERE DIVERTED AND DEVELOPED ON PRIVATE LAND;

1 AND

2 WHEREAS, THE STATE OF MONTANA IS VIOLATING 85-2-306, MCA, IN ASSERTING OWNERSHIP OVER A GROUND
3 WATER DEVELOPMENT IN WHICH THE STATE DOES NOT HAVE EXCLUSIVE PROPERTY RIGHTS IN THE GROUND WATER
4 DEVELOPMENT WORKS; AND

5 WHEREAS, the right to use water is a property right that cannot be taken without due process of law.

6 THEREFORE, the Legislature of the State of Montana finds that the use of water from a well or
7 developed springs that is diverted from a privately owned diversion works located on private land and utilized on
8 state land does not create an ownership interest in the water right in the state of Montana.

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 (Refer to Introduced Bill)

12 Strike everything after the enacting clause and insert:

13
14 NEW SECTION. Section 1. Temporary use of a water right on state trust land -- restrictions on
15 state ownership -- rescinding of noncompliant ownership interests required. (1) A water right owner may
16 put water from a well or developed spring with ground water development works located on private land to
17 beneficial use on state trust land for the duration of a state land lease the water right owner holds.

18 ~~(2) The state may not obtain an ownership interest in a water right or the ground water development~~
19 ~~works of a water right that is diverted from a well or developed spring exclusively based on trustee obligations~~
20 ~~for state trust land unless:~~

21 ~~—— (a) the ground water development works are located on state trust land;~~

22 ~~—— (b) all or part of the place of use of the water right is located on state trust land;~~

23 ~~—— (c) the state owns exclusive property rights in the ground water development works; and~~

24 ~~—— (d) other statutory requirements are met.~~

25 ~~—— (3) Except as provided in subsection (2), the state may only acquire ownership interests in a water right~~
26 ~~or ground water development works to satisfy trustee obligations for state trust land by exercising the right of~~
27 ~~eminent domain pursuant to Title 70, chapter 30.~~

28 (2) THE STATE MAY NOT OBTAIN AN OWNERSHIP INTEREST IN A WATER RIGHT OR THE GROUND WATER
29 DEVELOPMENT WORKS OF A WATER RIGHT THAT IS DIVERTED FROM A WELL OR DEVELOPED SPRING LOCATED ON PRIVATE
30 LAND EXCLUSIVELY BASED ON TRUSTEE OBLIGATIONS FOR STATE TRUST LAND UNLESS:

(A) A COURT OF COMPETENT JURISDICTION DETERMINES THAT THE STATE IS AN OWNER OF THAT PARTICULAR
WATER RIGHT; OR

(B) THE STATE IS IN POSSESSION OF A DEED TRANSFERRING OWNERSHIP OF THE WATER RIGHT TO THE STATE.

~~(4)(3)~~ Before September 30, 2019, the state shall rescind any claim of ownership it asserted or acquired TO SATISFY TRUSTEE OBLIGATIONS FOR STATE TRUST LAND prior to [the effective date of this act] in a water right or ground water development works to satisfy trustee obligations for state trust land that do not meet the requirements of ~~subsections (2) or (3)~~ SUBSECTION (2).

~~(5)~~(4) For the purposes of this section, "state trust land" has the meaning provided in 77-1-101.

NEW SECTION. Section 2. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [section 1].

NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 4. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to water from a well or developed spring with ground water development works developed prior to [the effective date of this act].

- END -



AN ACT GENERALLY REVISING WATER RIGHT LAWS IN CONNECTION WITH STATE LAND LEASES; DECLARING THAT THE USE OF PRIVATE WATER RIGHTS DERIVED FROM A WELL OR DEVELOPED SPRING WHOSE DIVERSION WORKS IS LOCATED ON PRIVATE LAND FOR USE ON STATE LAND IN CONNECTION WITH A STATE LAND LEASE DOES NOT RESULT IN AN OWNERSHIP INTEREST IN THE STATE OF MONTANA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

WHEREAS, the use of water derived from a well or developed spring whose diversion works is not located on state-owned land to provide stock water on state-owned land is in the best interest of the state land lessee and the state; and

WHEREAS, the ability to manage livestock grazing and improve grazing management through the use of stock tanks generates revenue to the state through increased revenue from grazing leases; and

WHEREAS, the state of Montana asserting ownership over privately held water rights derived from a well or developed spring whose diversion works are located wholly on private land serves as a disincentive to improving grazing management on state-owned lands through the use of water tanks; and

WHEREAS, the Montana Water Court in Case No. 43A-A found that the temporary use of a privately owned water right on state land did not equate to state ownership of all or a part of the water right; and

WHEREAS, a water right that is diverted and developed on private land is not subject to the holding in *Department of State Lands v. Pettibone*; and

WHEREAS, the state of Montana incorrectly expanded the scope of *Department of State Lands v. Pettibone* to include all trusts, not just school trust lands; and

WHEREAS, the state of Montana incorrectly expanded the scope of *Department of State Lands v. Pettibone* to assert ownership over water rights that were diverted and developed on private land; and

WHEREAS, the state of Montana is violating 85-2-306, MCA, in asserting ownership over a ground water development in which the state does not have exclusive property rights in the ground water development works; and

WHEREAS, the right to use water is a property right that cannot be taken without due process of law.

THEREFORE, the Legislature of the State of Montana finds that the use of water from a well or developed springs that is diverted from a privately owned diversion works located on private land and utilized on state land does not create an ownership interest in the water right in the state of Montana.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Temporary use of a water right on state trust land -- restrictions on state ownership -- rescinding of noncompliant ownership interests required. (1) A water right owner may put water from a well or developed spring with ground water development works located on private land to beneficial use on state trust land for the duration of a state land lease the water right owner holds.

(2) The state may not obtain an ownership interest in a water right or the ground water development works of a water right that is diverted from a well or developed spring located on private land exclusively based on trustee obligations for state trust land unless:

(a) a court of competent jurisdiction determines that the state is an owner of that particular water right;
or

(b) the state is in possession of a deed transferring ownership of the water right to the state.

(3) Before September 30, 2019, the state shall rescind any claim of ownership it asserted or acquired to satisfy trustee obligations for state trust land prior to [the effective date of this act] in a water right or ground water development works that do not meet the requirements of subsection (2).

(4) For the purposes of this section, "state trust land" has the meaning provided in 77-1-101.

Section 2. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [section 1].

Section 3. Effective date. [This act] is effective on passage and approval.

Section 4. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to water from a well or developed spring with ground water development works developed prior to [the effective date

of this act].

- END -

I hereby certify that the within bill,
HB 0286, originated in the House.

Speaker of the House

Signed this _____ day
of _____, 2019.

Chief Clerk of the House

President of the Senate

Signed this _____ day
of _____, 2019.

HOUSE BILL NO. 286
INTRODUCED BY A. REDFIELD

AN ACT GENERALLY REVISING WATER RIGHT LAWS IN CONNECTION WITH STATE LAND LEASES;
DECLARING THAT THE USE OF PRIVATE WATER RIGHTS DERIVED FROM A WELL OR DEVELOPED
SPRING WHOSE DIVERSION WORKS IS LOCATED ON PRIVATE LAND FOR USE ON STATE LAND IN
CONNECTION WITH A STATE LAND LEASE DOES NOT RESULT IN AN OWNERSHIP INTEREST IN THE
STATE OF MONTANA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE
APPLICABILITY DATE.



GOVERNOR'S OFFICE OF
BUDGET AND PROGRAM PLANNING

Fiscal Note 2021 Biennium

Bill #	HB0286	Title:	Review water right laws related to state water claims
Primary Sponsor:	Redfield, Alan	Status:	As Introduced

- ☐ Significant Local Gov Impact
 ☐ Needs to be included in HB 2
 ☒ Technical Concerns
- ☐ Included in the Executive Budget
 ☐ Significant Long-Term Impacts
 ☐ Dedicated Revenue Form Attached

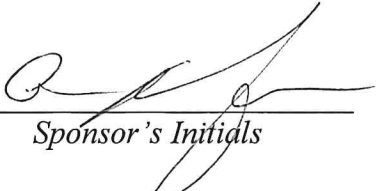
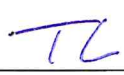
Description of fiscal impact: This bill has no fiscal impact to the state.

FISCAL SUMMARY

	<u>FY 2020 Difference</u>	<u>FY 2021 Difference</u>	<u>FY 2022 Difference</u>	<u>FY 2023 Difference</u>
Expenditures:				
General Fund	\$0	\$0	\$0	\$0
Revenue:				
General Fund	\$0	\$0	\$0	\$0
Net Impact-General Fund Balance:	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>

Technical Notes:

- The bill appears to be in conflict with 85-2-102 and 85-2-407, MCA.
- The pre-amble discusses stock water rights, but the bill language does not make that distinction. It would apply to all beneficial uses of groundwater and developed springs, including irrigation rights.
- Because the bill is to be codified into Title 85, Chapter 2, it would apply to all statement of claims, permits, notice of groundwater completions, and applications to add additional stock tanks. It appears contrary to define adjudicated rights, including statement of claims, as "temporary."

 _____ Sponsor's Initials	1/31/2019 _____ Date	 _____ Budget Director's Initials	1/30/19 _____ Date
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GOVERNOR'S OFFICE OF
BUDGET AND PROGRAM PLANNING

Fiscal Note 2021 Biennium

Bill #	HB0286	Title:	Review water right laws related to state water claims
Primary Sponsor:	Redfield, Alan	Status:	As Amended

- | | | |
|---|--|--|
| ☐ Significant Local Gov Impact | ☐ Needs to be included in HB 2 | ☒ Technical Concerns |
| ☐ Included in the Executive Budget | ☐ Significant Long-Term Impacts | ☐ Dedicated Revenue Form Attached |

FISCAL SUMMARY

	<u>FY 2020</u> <u>Difference</u>	<u>FY 2021</u> <u>Difference</u>	<u>FY 2022</u> <u>Difference</u>	<u>FY 2023</u> <u>Difference</u>
Expenditures:				
General Fund		*****UNKNOWN*****		
State Special Revenue		*****UNKNOWN*****		
Revenue:				
General Fund	\$0	\$0	\$0	\$0
State Special Revenue	\$0	\$0	\$0	\$0
Net Impact-General Fund Balance:		*****UNKNOWN*****		

Description of fiscal impact: The Department of Natural Resources and Conservation is unable to estimate the costs associated with HB 286.

FISCAL ANALYSIS

Assumptions:

1. The current amended version of HB 286 requires litigation for the Trust Lands Management Division of the Department of Natural Resources and Conservation to retain certain water rights. It is unknown how many cases will be brought and how quickly. The workload could range from one case that could be handled with existing resources, to multiple cases that would require additional legal help.

Technical Notes:

1. The pre-amble to HB 286 discusses stock water rights, but the bill language does not make that distinction. It would apply to all beneficial uses of groundwater and developed springs, including irrigation rights.
2. Because the bill is codified into Title 85, Chapter 2, it would apply to all statements of claim, permits, notices of groundwater completion, and changes to existing water rights. It is unclear what “temporary” means. It appears contrary to define adjudicated rights, including statements of claim, as “temporary.” There are provisions in Title 85, Chapter 2 that identify temporary permits and temporary changes. There are no such provisions for notices of completion.
3. The pre-amble states, “...the state of Montana is violating 85-2-306, MCA...” The language of the bill is not limited to water rights obtained under 85-2-306, MCA.
4. Prospective application of HB 286 as amended authorizes the development of private non-appurtenant water rights on school trust lands, interferes with the State’s management prerogatives, and alienates the State’s interest in those lands without compensation in direct contravention of the constitutional trust principles and holding in *Department of State Lands v Pettibone* (1985).
5. Pursuant to administrative rule and lease terms, the majority of post-1973 groundwater/developed spring water rights that have a place of use on school trust land were acquired and issued with the State named as owner or co-owner of the right. Applying HB 286 as amended retroactively divests the State of these post-1973 water rights without compensation if the point of diversion is on private land. This violates constitutional trust principles.

Sponsor’s Initials

Date

TL
Budget Director’s Initials

4/8/19
Date

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 66th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: Chair Kerry White, on February 13, 2019 at 3:00 PM, in Room 172
Capitol

ROLL CALL

Members Present:

Rep. Kerry White, Chair (R)
Rep. Willis Curdy, Vice Chair (D)
Rep. Bob Brown (R)
Rep. Robert Farris-Olsen (D)
Rep. Ross H. Fitzgerald (R)
Rep. Steve Gunderson (R)
Rep. Emma Kerr-Carpenter (D)
Rep. Marilyn Marler (D)
Rep. Dale Mortensen (R)
Rep. Mark Noland (R)
Rep. Marvin Weatherwax (D)

Members Excused: Rep. Theresa Manzella, Vice Chair (R)
Rep. Zach Brown (D)
Rep. Casey Knudsen (R)
Rep. Rhonda Knudsen (R)

Members Absent: None

Staff Present: Joe Kolman, Legislative Branch
Jacie Vonada, Committee Secretary

Audio Committees: These minutes are in outline form only. They provide a list of participants and a record of official action taken by the committee. The link to the audio recording of the meeting is available on the Legislative Branch website.

Committee Business Summary:

Hearing & Date Posted: HB 383, 2/4/2019; HB 286, 2/4/2019

15:07:07 Chair White

15:08:19 Rep. Rhonda Knudsen arrived to the meeting.

15:08:34 Rep. Noland assumed the Chair.

HEARING ON HB 383

Opening Statement by Sponsor:

15:08:44 Rep. Kerry White (R), HD 64, opened the hearing on HB 383, Extend deadline for appeal of streambed permit.

15:09:55 Rep. Zach Brown arrived to the meeting.

Proponents' Testimony:

15:10:47 Abigail St. Lawrence, Rocky Mountain Stockgrowers Association (RMSGA)

Opponents' Testimony:

15:12:10 Dan McGowan, Montana Association of Conservation Districts (MACD)

Informational Testimony:

15:14:22 Mark Bostrom, Department of Natural Resources and Conservation (DNRC)

[EXHIBIT\(nah30a01\)](#)

[EXHIBIT\(nah30a02\)](#)

Questions from Committee Members and Responses:

15:15:45 Vice Chair Curdy

15:16:32 Mr. McGowan, MACD

15:17:15 Rep. Bob Brown

15:18:18 Mr. McGowan, MACD

15:19:26 Rep. Bob Brown

15:19:43 Mr. McGowan, MACD

15:20:01 Rep. Bob Brown

15:20:11 Rep. Farris-Olsen

15:20:40 Ms. St. Lawrence

15:21:14 Chair Noland

15:21:20 Rep. White

15:22:23 Chair Noland

Closing by Sponsor:

15:21:49 Rep. White

15:27:05 Chair White resumed the Chair.

HEARING ON HB 286

Opening Statement by Sponsor:

15:27:17 Rep. Alan Redfield (R), HD 59, opened the hearing on HB 286, Review water right laws related to state water claims.

15:28:29 Vice Chair Manzella arrived to the meeting.

Proponents' Testimony:

15:30:37 Krista Lee Evans, Senior Water Rights Coalition (SrWRC), Association of Gallatin Agricultural Irrigators (AGAI)

[EXHIBIT\(nah30a03\)](#)

[EXHIBIT\(nah30a04\)](#)

[EXHIBIT\(nah30a05\)](#)

[EXHIBIT\(nah30a06\)](#)

[EXHIBIT\(nah30a07\)](#)

15:45:37 Colleen Coyle, self

15:47:31 Rep. Casey Knudsen arrived to meeting.

15:49:17 Jay Bodner, Montana Stockgrowers Association (MSGA), Montana Cattle Women (MCW)

[EXHIBIT\(nah30a08\)](#)

15:54:03 Liv Stavick, Montana Farm Bureau

15:55:49 Mike Murphy, Montana Water Resources Association (MWRA)

15:56:36 Rep. Zach Brown left the meeting.

15:57:31 Cindy Palmer, Montana Farmers Union (MFU)

15:58:37 Susan Lake, self

16:00:00 Ronda Wiggers, Montana Water Wells Driller Association

Opponents' Testimony:

16:00:50 Abigail St. Lawrence, Rocky Mountain Stockgrowers Association (RMSGA)

16:03:24 Shawn Thomas, Department of Natural Resources and Conservation (DNRC)

16:07:35 Jan Langel, Department of Natural Resources and Conservation (DNRC)

16:10:37 Brian Bramblett, Department of Natural Resources and Conservation (DNRC)

Informational Testimony:

16:20:31 Bill Schenk, Department of Fish, Wildlife and Parks (FWP)

Questions from Committee Members and Responses:

16:21:12 Rep. Rhonda Knudsen

16:22:07 Ms. Coyle, self

16:24:03 Vice Chair Curdy

16:24:40 Mr. Bramblett, DNRC

16:26:13 Vice Chair Curdy

16:27:00 Mr. Thomas, DNRC

16:30:49	Vice Chair Manzella
16:31:38	Mr. Bramblett, DNRC
16:32:02	Vice Chair Manzella
16:32:16	Mr. Bramblett, DNRC
16:32:28	Vice Chair Manzella
16:32:47	Mr. Bramblett, DNRC
16:33:33	Vice Chair Manzella
16:33:46	Chair White
16:34:11	Mr. Bramblett, DNRC
16:34:17	Chair White
16:34:34	Mr. Bramblett, DNRC
16:34:50	Chair White
16:36:00	Mr. Bramblett, DNRC
16:36:59	Chair White
16:38:06	Mr. Thomas, DNRC
16:39:05	Chair White
16:39:25	Mr. Thomas, DNRC
16:39:44	Chair White
16:40:12	Mr. Thomas, DNRC
16:40:20	Chair White
16:40:34	Rep. Noland
16:41:38	Mr. Bramblett, DNRC
16:42:30	Rep. Noland
16:43:26	Rep. Fitzgerald
16:44:23	Mr. Thomas, DNRC
16:45:11	Rep. Fitzgerald
16:45:28	Mr. Thomas, DNRC
16:45:58	Rep. Bob Brown
16:46:50	Mr. Bramblett, DNRC
16:47:30	Rep. Bob Brown
16:47:47	Mr. Bramblett, DNRC
16:48:03	Rep. Rhonda Knudsen
16:48:59	Ms. Evans, SrWRC, AGAI
16:49:21	Rep. Redfield
16:50:03	Rep. Rhonda Knudsen
16:50:14	Vice Chair Curdy
16:50:41	Mr. Bramblett, DNRC
16:50:44	Vice Chair Curdy
16:51:00	Mr. Bramblett, DNRC
16:51:14	Chair White
16:51:23	Rep. Farris-Olsen
16:52:04	Mr. Bramblett, DNRC
16:52:30	Rep. Farris-Olsen
16:52:40	Mr. Bramblett, DNRC
16:53:34	Chair White
16:54:10	Mr. Bramblett, DNRC
16:54:59	Chair White
16:55:26	Mr. Bramblett, DNRC
16:56:02	Chair White
16:57:19	Mr. Bramblett, DNRC

16:58:29 Chair White
16:59:44 Mr. Thomas, DNRC
17:00:22 Chair White
17:00:46 Mr. Thomas, DNRC
17:01:18 Rep. Gunderson
17:01:37 Mr. Bramblett, DNRC
17:01:56 Rep. Bob Brown
17:02:28 Mr. Bramblett, DNRC
17:03:30 Rep. Bob Brown
17:03:43 Mr. Bramblett, DNRC
17:04:15 Rep. Gunderson
17:05:16 Mr. Bramblett, DNRC
17:05:47 Rep. Gunderson
17:06:02 Mr. Bramblett, DNRC
17:06:07 Rep. Gunderson
17:06:23 Mr. Bramblett, DNRC
17:06:56 Rep. Gunderson
17:07:31 Vice Chair Curdy
17:07:44 Mr. Bramblett, DNRC
17:08:04 Vice Chair Curdy
17:08:12 Mr. Bramblett

Closing by Sponsor:

17:08:26 Rep. Redfield

17:10:52 Chair White

ADJOURNMENT

Adjournment: 17:11:59

Jacie Vonada, Secretary

jv

Additional Documents:

EXHIBIT([nah30aad.pdf](#))

DATE 13 FEBRUARY 2019

HB 286 / *Christa Lee Evans*

SRWRC

AGAI

406-439-2215

No. 83-281

IN THE SUPREME COURT OF THE STATE OF MONTANA

1985

IN THE MATTER OF THE ADJUDICATION
OF THE EXISTING RIGHTS TO THE USE
OF ALL THE WATER, BOTH SURFACE AND
UNDERGROUND, WITHIN THE POWDER RIVER
DRAINAGE AREA, INCLUDING ALL TRIBU-
TARIES OF THE POWDER RIVER IN CARTER,
CUSTER, FALLON, PRAIRIE, and POWDER
RIVER COUNTIES, MONTANA,
DEPARTMENT OF STATE LANDS,

Objector and Appellant,

-vs-

WALTER PETTIBONE, DAVID and MELINDA
BLISS, ERNEST and PEGGY TOOKE,
GIACOMETTE RANCH, P.J. RANCH, ELMER
OEDEKOVEN, E. AMORY HUBBARD, CINCH
BUCKLE RANCH, MALLET CATTLE COMPANY,
ROBERT F. HARDY TRUST, ALVIN and HELEN
IRION, HARDY LAND & LIVESTOCK COMPANY,
and BALES RANCH,

Claimants and Respondents.

APPEAL FROM: The Water Courts of the State of Montana,
The Yellowstone Division-Powder River Basin,
The Honorable W.W. Lessley, Chief Judge.

COUNSEL OF RECORD:

For Appellant:

Lyle Manley argued, Dept. of State Lands, Helena,
Montana; John F. North, Dept. of State Lands

For Respondents:

John Carr argued for Bliss & Bales Ranch, Miles City,
Montana

For Amicus Curiae:

Albert W. Stone, U of M Law School, Missoula, Montana
Gough, Shanahan, Johnson & Waterman; Ronald F. Waterman
argued for Montana Stockgrowers Assoc., Helena,
Montana

Submitted: February 21, 1985
Decided: June 18, 1985

Filed: JUN 13 1985

Ethel M. Harrison

Clerk

Mr. Justice L. C. Gulbrandson delivered the Opinion of the Court.

The State of Montana appeals from the Powder River Final Decree holding title to certain water rights to be vested in respondents. We reverse.

The State of Montana, Department of State Lands, objected to the portion of the Powder River Preliminary Decree that awarded title of certain water rights to the above-named respondents, all lessees of State school trust lands. All of the factual disputes, as to flow, source and place of diversion and place of use were resolved prior to the hearing on the State objection held November 24, 1982. The hearing was confined solely to the following question of law:

Does title to the water right vest in the lessee or the State of Montana as owner of the land where the water is diverted?

On April 4, 1983, The Water Courts Judgment--The Powder River Final Decree, was issued. It held that the title to the waters diverted on State school trust lands vests in the lessee, and not the State.

The State appealed this portion of the Final Decree. The appeal was first heard by this Court on January 13, 1984. Subsequently, by Order of March 26, 1984, we directed the parties to rebrief the case, and to address certain questions. Because of the broad significance of this case, we also solicited amicus curiae participation. The parties, and several amici, submitted supplemental briefs, and the matter was again heard on January 25, 1985.

There are twenty-three water rights involved in this appeal. They generally fall into one of the following categories:

- 1) Groundwater Wells: Four rights are from groundwater wells. Three of the

wells are on school trust lands, and used wholly thereon. One straddles the border between a state-owned and privately-owned section, and is used on both.

2) Developed Springs: Three rights are in developed springs for stock watering. The springs, and their uses, are confined to the school trust lands.

3) Diversions of Tributaries: Fifteen rights arise from diverting named or unnamed tributaries of larger creeks. In most, the appropriator has constructed a small dam on the tributary creating a small reservoir for stock watering. In some instances, water continues to flow from the reservoirs to the larger creek. One of the rights involves a draw of water from the Powder River devoted to irrigation, not stockwatering.

Thirteen of these diversions occur wholly on school trust lands with the use confined thereon. One right is in a reservoir on state land that serves both the state section and an adjacent private section. The last of these rights is an appropriation used for irrigation. In that case, the diversion is on state land, and the use is on both state and private land.

4) Direct Use: One right is in an undeveloped spring and its drainage adjacent to a creek in the Powder River drainage. The spring, and its use, is confined to the school trust land. This right has the oldest priority date of any at issue here, October 1, 1883.

According to the decrees associated with these rights, each is exercised year-round; although in times of drought, this may not be possible.

The lands upon which these water rights lie are those that were granted to the State of Montana by the Federal Government in the Montana Enabling Act. Act of February 22, 1889, ch. 180, 25 Stat. 676. Originally, these lands were set aside in the Montana Territory Organic Act, Act of May 26, 1864, ch. 95, 13 Stat. 85, which provided that said lands were "reserved for the purpose of being applied to schools" ch. 95, section 14, 13 Stat. 91 in the Montana Territory.

The Enabling Act granted these lands to the state on the following terms:

"Section 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools.

". . .

"Section 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased . . . " ch. 180, 25 stat. 679.

The 1889 Montana Constitution accepted these lands and provided that they would be held in trust consonant with the terms of the Enabling Act, Montana Constitution of 1889, art. XVII, sec. 1. The 1972 Montana Constitution continued these terms, Mont. Const. art. X, sec. 11, ch. 1. See also section 77-1-202, MCA (school lands held in trust for the support of education).

The duty of administering the school trust lands is placed upon the Board of Land Commissioners (Board). Section 77-1-202(1), MCA provides that "The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the State." Pursuant to 77-1-301(1), MCA, the Department of State Lands, (DSL) under the direction of the Board, " . . . has charge of the selecting, exchange, classification, appraisal, leasing, management, sale, or other disposition of state lands" The Department of State

Lands has also promulgated regulations governing the management, sale or lease of school trust lands. See generally Title 26, A.R.M.

Each of the respondents is a lessee of one or more sections of school trust lands. The DSL, by statute, sections 77-6-115 and 77-6-301 and -302, MCA, and by regulation §26-3.123, A.R.M., allows lessees to divert waters on the leasehold, develop them, and put them to use on or off that land. None of the rights at issue in this case were perfected pursuant to the above mentioned statutes or regulations. Rather, the lessees claim these rights as "use rights," which have long been recognized in this State, see *Murray v. Tingley* (1897), 20 Mont. 260, 50 P. 723, and *Stone, Montana Water Law for the 1980's*, p. 3, (1981 ed.)

These rights are at issue because of the general water rights adjudication underway in Montana. This process began with the passage of the Montana Water Use Act of 1973, ch. 452, L. 1973. The legislature enacted the Water Use Act in response to the chaos of previous Montana water law. See *Stone, The Long Count on Dempsey: No Final Decision in Water Rights Adjudication*, 31 Mont.L.Rev. 1 (1969); *Stone, Are There Any Adjudicated Streams in Montana?* 19 Mont.L.Rev. 19 (1957). It set up a system of general stream adjudication administered by the Department of Natural Resources and Conservation (DNRC) and also provided, from that time on, that the statutory method was the exclusive way to acquire a water right.

Prior to 1973, there were two possible ways of perfecting a water right. First was the method provided for by statute; posting at the point of diversion and filing a notice with the county clerk, Mont. Laws 1885, secs. 6 through 10; R.C.M. (1947), 89-810 through 814. Second was

simply by putting the water to use, *Murray v. Tingley*, supra. The 1885 Act did not provide for any general adjudication of streams. Nor did it provide any mechanism by which actual uses, as opposed to claimed uses, could be ascertained. As Professor Stone, in Montana Water Law for the 1980's states, the problems the legislature addressed in 1973 were many:

"It [the old water rights system under the 1885 Act] merely provided for isolated lawsuits between particular water users over their individual rights in isolated parts of streams. The statute resulted only in piecemeal litigation, often repetitive and among the same neighbors, over and over again disputing one another's claims. [Citations omitted.] It did not lead to security in one's property rights nor to finality in determining the fair and legal distribution of water among neighboring claimants.

"But not only were the individual water users ill-served by this failure to establish water rights; the public interest also required an inventory of the state's water needs so that future negotiations or dealings with downstream states could allocate the waters of our interstate rivers." Stone, supra at p. 4.

The system of adjudication established by the 1973 Act soon encountered difficulties. First, it required the DNRC to physically inspect or discover all water rights. It soon became evident that this process would take a very long time. Six years after the 1973 Act was passed, the inspection and adjudication of the Powder River Basin, one of the smallest and relatively simplest in the State, was still in its initial stages. Second, the 1973 Act did not provide for the adjudication of federally reserved rights--presenting the spectre of concurrent, wasteful and possibly inconsistent litigation in the Federal Courts.

Responding to the shortcomings of the 1973 Act, the 1979 Montana Legislature enacted Senate Bill 76, ch. 697 L. 1979. It established a system of water courts and put upon

appropriators and users the burden of filing claims for their rights. It also provided for reserved water rights and set up a Compact Commission to negotiate the federal and Indian reserved rights. Ch. 697, sec. 27, L. 1979.

The Water Court system is charged with the final adjudication of water rights. Based upon the claims filed by users and appropriators, the court issues temporary preliminary decrees cataloging the various rights and priorities in the respective basin. All named or affected parties have, at that time, an opportunity to object to the temporary preliminary decree. If no objections are raised, the temporary decree is made final. Objections are heard and adjudged by the Water Court, with the right of appeal to this Court.

This is the first appeal we have been called on to hear from a final decree of the Water Court. In reviewing this, and subsequent final decrees, we will apply the same standards of review as any other appeal from a District Court order.

The question we consider is: Who is the owner of a water right diverted or developed on school trust land; the State or the lessee?

We hold that title to these water rights vests in the State. The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee shall be reimbursed for all capital expenditures made in putting the water to beneficial use. The lessee, under the terms of the lease, is simply entitled to the use of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands

prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefor.

The school trust lands are endowments by the United States to the State of Montana for the benefit of the common schools. A major policy of the fledgling nation was to foster public education by grants of land to newly admitted states for that purpose. Each of the thirty states carved out of the public domain received such grants, varying in the quantity granted, and terms of the grant, as national policy and political winds dictated. See generally Woodgerd and McCarthy, State School Trusts and Oil and Gas Royalty Rates, 3 Pub.Land L.Rev. 1 (1982).

Montana was admitted to the Union in 1889 along with Washington, North Dakota, and South Dakota. The Omnibus Enabling Act, supra, reflects the general policy of Congress as set out above. Even before Montana joined the Union, general principles, evolving from the judicial review of earlier enabling acts, governing the school land grant trusts were well settled. In two cases, the Trustees of Vincennes University v. State of Indiana (1852), 55 U.S. 268, 14 L.Ed. 267, and Springfield Township v. Quick (1859), 63 U.S. 56, 16 L.Ed. 256, the United States Supreme Court set out three important principles governing school trust lands: 1) that the enabling acts created trusts similar to a private charitable trust which the state could not abridge; 2) that the enabling acts were to be strictly construed according to fiduciary principles, and; 3) that the enabling acts preempt state laws or constitutions. See also Andrus v. Utah (1980), 446 U.S. 500, 520, 523, 100 S.Ct. 1803, 1814, 1815, 64 L.Ed.2d 458, 472, 474, where the United States Supreme Court reaffirmed those principles, holding that Congress imposed

upon the states a binding and perpetual obligation to use the granted lands for public education.

The courts have been very protective of the trust concept, and emphatic about the need to preserve the value of the trust corpus-the school lands. The seminal case in this regard is *Lassen v. Arizona* (1967), 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515. In Lassen, the United States Supreme Court held that the Arizona Highway Department was required to fully compensate the State Land Department (administrator of the school lands) for the value of easements taken across school lands. The Court held that the Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910) "contain[ed] 'a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose'" Lassen at 467, 87 S.Ct. at 589, 17 L.Ed.2d at 522 (quoting *Ervien v. United States* (1928), 251 U.S. 41, 47, 40 S.Ct. 75, 76, 64 L.Ed. 128, 130).

In *State of Utah v. Andrus* (D. Utah 1979), 486 F.Supp. 995, the federal district court concluded that the lessees of state school lands had an implied right of access to their leasehold across adjacent federal lands. The court felt that if it held otherwise, "the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend." 486 F.Supp. at 1002. The Court in *Utah v. Andrus* made it clear that any restriction on the use (i.e. access) of school trust land that effectively devalues it cannot be sustained.

This Court has likewise been emphatic in protecting the school trust. In *Rider v. Cooney* (1933), 94 Mont. 295, 23 P.2d 261, we first held that a lease is an "interest" in land. Then, applying the rule that interests in school trust

lands cannot be alienated for less than full value, we held that the State must also obtain full value for a lease thereof. See also *State ex rel. Galen v. Dist. Ct.* (1910), 42 Mont. 105, 112 P. 706; *Gladden Farms, Inc. v. State* (Az. 1981), 633 P.2d 325; *Arizona State Land Department v. Superior Court* (Az. 1981), 633 P.2d 330; *City of Sierra Vista v. Babbitt* (Az. 1981), 633 P.2d 333; *State v. University of Alaska* (Ak. 1981), 624 P.2d 807.

In *Jerke v. State Dept. of Lands* (1979), 182 Mont. 294, 597 P.2d 49, we addressed a situation analogous to the one at bar. The general question presented was how far the State could surrender its managerial prerogatives over school lands without violating the trust. Montana law empowers grazing districts to manage and allocate lands within their jurisdiction. This includes the power to grant preference rights to members in the re-leasing of school lands that are within the district. The plaintiff in *Jerke* contended that the preference right unconstitutionally prevented the State from receiving full fair market value for the land. Since the existing lessee who exercised the preference right was not using the land (and thus not "follow[ing] good agricultural practices and mak[ing] improvements on the land" 182 Mont. at 297, 597 P.2d at 51), we held the preference right was unconstitutional as applied. This was because:

"To allow the preference right to be exercised in this case would be to install the Grazing District as the trustee of the land. It, rather than the Department of State Lands, would decide who will occupy the land but it would not be bound by a constitutional or fiduciary duty." 182 Mont. at 297, 597 P.2d at 51.

See also *State ex rel. Thompson v. Babcock* (1966), 147 Mont. 46, 409 P.2d 808 (upholding the Commissioner's discretionary authority to accept lease terms less than the highest bid in order to effectuate sustained yield concepts and insure the

long-term strength of the trust corpus); In Re Montana Trust and Legacy Fund (1964), 143 Mont. 218, 388 P.2d 366. The Oklahoma Supreme Court in Oklahoma Education Association v. Nigh (Ok. 1982), 642 P.2d 230 has also addressed the same question as this Court did in Jerke. The Oklahoma court went further and found several state statutes limiting the amount of interest that the state could receive on school lands, and creating preferences in the re-leasing of school lands, to be unconstitutional.

Most recently, the Washington Supreme Court upheld the federal land grant trust in holding the Washington Forest Products Industry Recovery Act of 1982, R.C.W. 79.01.1331-.1339, unconstitutional. The Act was passed in response to the decline of the prices in the forest products industry at the time. It allowed the Washington Department of State Lands to release contracts previously entered into with loggers and other forest products users because the industry stood to lose a great deal, due to the decline in prices, if the contracts were enforced. The Washington Supreme Court, in Skamania County v. Washington (Wa. 1984), 685 P.2d 576, dealt with the contracts on school trust land. Premising its argument by stating: "Every court that has considered this issue has concluded that these are real enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees," 685 P.2d at 580, the court found the act had violated the trust by transferring trust assets--the contract rights--for less than their full value and held it unconstitutional. 685 P.2d at 583. See also Torve and Handy, Skamania County v. Washington: A Case of Divided Loyalties, Fall 1984, Western Natural Resources Litigation Digest Commentary 7.

The above cases establish two main points that are important when considering either minor premise leading to our decision. First, an interest in school land cannot be alienated unless the trust receives adequate compensation for that interest. Water that is appurtenant to the school lands is an interest for which the trust must receive compensation. Second, any law or policy that infringes on the state's managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land. In this case, the DSL contends that to allow lessees to develop private, personal rights on school lands would impermissibly reduce the DSL's ability to manage these lands for their highest value.

Section 70-15-105, MCA states that:

"A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse or of a passage for light, air or heat from or across the land of another."

Further, Professor Wells A. Hutchins, in his treatise Water Rights Laws in the Nineteen Western States Vol. I at 455 (U.S. Dept. of Agriculture, 1971) states: "Of general application in the West is the rule that an appropriative right becomes appurtenant to the land for the benefit of which the water is applied."

In Montana, the determination of whether water is appurtenant to the land is one of fact. *Yellowstone Valley Co. v. Associated Mortgage Investors, Inc.* (1930), 88 Mont. 73, 290 P. 255; see also Hutchins, supra at 459. Here, by stipulated facts, it appears that all of the water rights at issue are used either in whole or in part on the school lands. Additionally, all of the lands in question are classified grazing lands under sections 77-1-401 to -404, MCA, and the water appropriated on them is used for

stockwatering or other agricultural purposes. The water rights in question are appurtenant.

This conclusion is consistent with the general rule that when title to irrigated property is passed, the water rights pass as an appurtenance unless specifically excepted. Section 85-2-403, MCA; *Castillo v. Kunnemann* (Mont. 1982), 642 P.2d 1019, 39 St.Rep. 460; *Adams v. Chilcott* (1979), 182 Mont. 511, 597 P.2d 1140; *Schwend v. Jones* (1973), 163 Mont. 41, 515 P.2d 89. Respondents point to no authority explaining why the rule in regard to leases of land should be different than with the sale of land. We believe it should be the same--the parties to any such transaction may specifically effect a severance, but absent such, the water right remains appurtenant, following title. It does not make sense for each succeeding tenant to walk off with one water right after another.

Respondents cite several cases that appear to articulate a contrary rule. The first, *Smith v. Denniff* (1900), 24 Mont. 20, 60 P. 398, is distinguishable in the fact that it concerned water appropriations made by squatters on the federal lands who diverted water for use on the public domain. The school trust lands were withdrawn from the public domain by the Montana Territory Organic Act, *supra*, in 1866, and none of the rights at issue in this case were developed before then. As discussed above, school trust lands are subject to a different set of rules than other public lands. Secondly they cite *Hayes v. Buzzard* (1904), 31 Mont. 74, 77 P. 423 for the rule that the question of whether water is appurtenant to the underlying land turns upon the intention of the appropriator. Again, Hayes arose on public domain land, not school trust land. This Court recognized that distinction:

"The legal title to the land upon which a water right acquired by appropriation made on the public domain [emphasis added] is used or intended to be used in no wise affects the appropriators title to the water right, for the bona fide [emphasis in original] intention which is required of an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other than those of the appropriator, or a use for purposes other than those for which the right was originally appropriated." 31 Mont. at 81 77 P.2d at 425, quoting Smith v. Deniff, supra.

(See also Ervien, 246 F. at 280: "Congress did not intend that the [school trust] lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people. . . ") Respondents' argument does not answer the state's concern with meeting its trust responsibilities.

Since an appurtenant water right is an interest in the land (see also section 70-1-106, MCA; Yellowstone Co. v. Asso. Mtg. Investors, supra) it cannot be surrendered by the State without the trust receiving fair market value. None of the lessees alleged payment of consideration to the State apart from that required by the lease, and thus we conclude that the water rights appurtenant to such lands belong to the State.

The State argues that vesting title in lessees would violate the trust for another reason. If a lessee lost his lease, but retained the water right, that lessee would in effect be able to control the use of the land. In many cases in this semi-arid area, the control of water means the control of the land itself. Conceivably, the DSL, in a desire to insure that the land had water, could find itself in the awkward position of negotiating with a former lessee, who might be inclined to release his right only to family or friends--thus assuring his re-entry. The former lessee could

"chill" the bidding process by letting it be known that he would only release his right at an inflated price. Finally, the former lessee could conceivably dictate possible uses of the land in return for the water. This situation is clearly repugnant to school trust principles. This Court, in *Jerke v. State Department of Lands*, *supra*, and other courts, see *Oklahoma Education Assoc. v. Nigh*, *supra* and *State of Utah v. Andrus*, *supra*, have consistently held that any infringement on the use or management prerogatives of the State that effectively devalue school lands is impermissible. We agree, and find this to be an alternative ground for our decision.

Respondents point to section 77-6-115, MCA, which states in pertinent part that:

"(1) The lessee of state lands may at any time prior to 1 year before the expiration of his lease make application to the board for permission to secure a water right to the land under his lease. . . . If the proposed plan meets with the approval of the board, permission shall be granted the lessee to secure the desired water right for the land and to place the same under irrigation.

"(2) If such water right becomes a permanent and valuable improvement, then in case of the sale or lease of the lands to other parties, the former lessee shall be entitled to receive compensation in the amount of the reasonable value thereof, as in the case of other improvements, from the new lessee or the purchaser.

"(3) These provisions shall not be so construed as to make the state liable to the lessee for the payment of the cost or value of such irrigation improvements."

They contend that this statute, in effect, acknowledges the property interest of the lessee in the water right, and further, that in subsection (3) the State denounces any interest in the water by releasing itself from liability for the cost of irrigation improvements. Respondents also point to §26,3.123, A.R.M., which provides that the State shall

reimburse departing lessees for the reasonable value of the improvements made (as per section 77-6-115(2), MCA), and that, "[a]ny water rights hereafter secured by the lessee shall be secured in the name of the state of Montana." They argue that since §26-3.123 A.R.M. was not adopted until 1979, it does not apply to the water rights in this case because all of them predate it. They also argue that the provision lends itself to supporting the position that the State had acquiesced in recognizing pre-1979 water rights in lessees. Both of these arguments are unfounded. First, none of the alleged rights at issue in this case were perfected pursuant to section 77-6-115, MCA or §26-3.123, A.R.M. Neither provision can be used as direct authority by respondents. For that reason we are not called upon to construe section 77-6-115, MCA. We note though that it is capable of two interpretations: first, as applying to water rights as respondents argue; secondly, as applying only to improvements, such as ditches, reservoirs, headgates, and other capital projects, constructed "for" or attached "to" the land and not subject to being retained by the lessee upon payment by a new lessee or purchaser, as is the case with other improvements to the leasehold, as contended by the State. The general rule is that whenever there are differing possible interpretations of statute, a constitutional interpretation is favored over one that is not. *United States v. Clark* (1980), 445 U.S. 23, 100 S.Ct. 895, 63 L.Ed.2d 171; Sutherland on Statutory Construction §45.11 (1984 ed.). In this regard, we point to the Skamania and Nigh, decisions holding statutes unconstitutional because they violated the school trust principles established by that state's Enabling Act.

In the alternative, respondents argue that section 77-6-115, MCA, and the principles of the Water Use Act set forth in section 85-2-101, MCA, and the prior appropriation doctrine, give rise to an implied severance of water from land in the school trust land leases, and that the State is now estopped to deny these rights because of the long-standing and detrimental reliance by the lessees.

As we discussed above, the State holds these lands subject to the school trust. The essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such property do so "subject to the trust" *Nat. Audubon Society v. Superior Court* (Cal. 1983), 658 P.2d 709, 723. See also *Illinois Central Railroad v. Illinois* (1892), 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (a state may not abdicate its trust in public property); and *Thompson v. Babcock*, supra at 54, 409 P.2d at 812, ("[w]hen state land is leased, it does not relinquish the entire interest therein"). The State has no power, absent adequate consideration, to grant the lessees the permission to develop non-appurtenant water rights, and every school trust lease carries with it this limitation.

Respondents' argument that they have detrimentally relied upon "representations" by the State made through its laws and regulations, is not persuasive. There has been no detriment. Section 77-6-302, MCA provides that lessors will receive reasonable compensation for any improvements they have made on the leasehold if they relinquish the property to a new lessee or purchaser. Further, the argument that this rule sets up disincentives to the development of our water resources, contrary to the general policy set out in the Water Use Act of promoting the beneficial use of water, is also not persuasive. Section 77-6-302, MCA actually

insulates the developer-lessee from any market risk that he would have to bear if making improvements on his own land.

The Montana Constitution requires this result. Art. IX, sec. 3(1), provides that "all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." This provision prevents the State from affecting rights vested at the time the Constitution was adopted other than through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, sec. 29, or the general police power, and without affording due process of law, Mont. Const. Art. ~~II~~¹⁷, sec. ~~19~~¹⁷. Here the State, through the adjudication process, is claiming, and this Court is recognizing rights "existing" at the time the 1972 Constitution was adopted-- Art. IX, sec. 3(1) merely reaffirms these rights.

As stated above, we hold that the lessee, under the terms of the school trust lease, is entitled to the use of water appurtenant to the leased land. The State is the beneficial user thereof, and its duty as trustee of the school lands prohibits it from alienating this interest in the land absent full compensation therefor. Absent such compensation, the title to the water rights in this case vest in the State.

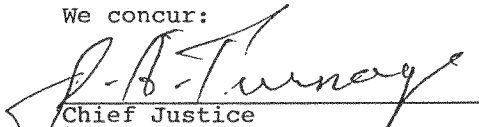
Appellants and amici have urged this Court to find that school trust lands benefit from a federally reserved water right as originally recognized in *Winters v. United States* (1907), 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340, to which the State has succeeded. In our opinion, it is perhaps best to keep the reserved rights doctrine confined to situations where it arose and is most appropriate; as an accommodation between federal and state interests. Since the rule we have stated is sufficient to settle the case at bar, principles of judicial restraint counsel us to decline ruling further.

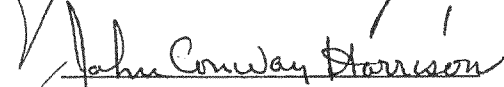
This rule applies to all the waters at issue. Subject to Title 85, Chapter 2, Part 5, MCA, groundwater appropriated and used on State land should be treated no differently than surface waters appropriated and used on those lands. The Montana Constitution, Art. IX, sec. 3, Mont. Const. and the Water Use Act, section 85-2-102(14), MCA, make no distinction between groundwater and other water rights.

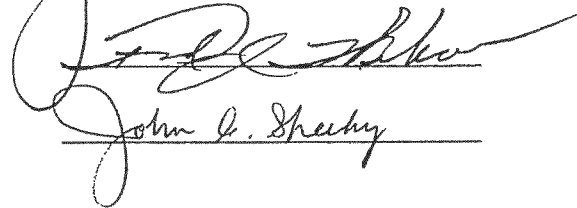
The Order of the Water Court is reversed, and the case remanded for the purpose of modifying the Powder River Final Decree in compliance with this Opinion.

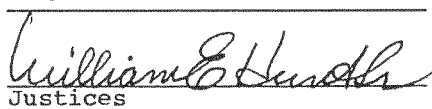

Justice

We concur:


Chief Justice


Justice


Justice


Justices

Mr. Justice Frank B. Morrison, Jr. specially concurring:

The majority opinion recalls to mind the old Montanan who said, "A moose is a cow designed by a committee." Indeed, this moose must have been designed by a committee.

The only bright light which shines through this otherwise verbose and rambling epistle is the result. In that I concur.

The majority opinion contains a good deal of judicial chaff including a rather lengthy recital of irrelevant historical data surrounding passage of the Montana Water Use Act of 1973. This effort effectively obfuscates the issues while impressing the casual reader that scholarship is the cornerstone of the majority's pronouncement.

The issue in this case is quite simple and straight forward. At the time the federal government granted school lands to the state in trust for educational purposes, did the federal government include within the grant the right to develop water to achieve the educational purposes of the trust? If, as an incident of ownership, the state acquired, as appurtenant to the land, the right to develop water so that the purpose of the trust could be realized, then the state cannot alienate that property right in diminution of the trust res.

The majority opinion initially indicates that the educational purpose of the trust cannot be realized without an appurtenant water right. With this I agree. However, in an apparent attempt to avoid interrupting the priorities of other appropriators, the majority seems to be saying that this appurtenant right did not spring into existence until it was developed by the lessee. This approach recognizes the priority of appropriators. In order to accomplish this objective the majority has created a fictional agency whereby

the lessee, who develops the water, does so on behalf of the state. This nonsense is engaged to achieve a result.

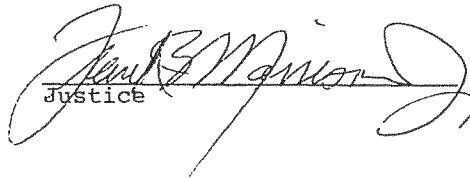
The majority's effort to secure unto school lands a sufficient amount of water to maximize their income potential for the trust, without disrupting prior rights, could have been achieved on a more legally sound foundation by simply holding that the federal government granted to the state school lands with the appurtenant right to develop water in order to maximize their income producing ability. The court then could have held that, under the prior appropriation doctrine, a priority date did not commence until the right was developed. In this way, at least, the majority would have recognized the property right in the state from the beginning which would give a basis for holding that the lessee developed the right for the state.

In truth, these school lands were withdrawn from the public domain prior to any appropriation. The federal government granted to the state, in trust for educational purposes, land and the water necessary to develop the land for its trust purposes. Later, when the public domain was settled appropriations were made but the appropriations only operated on those lands remaining in the public domain. Settlers who moved in and appropriated could have obtained no water from school lands which resided safely in the trust.

I find it unfortunate that reference is made to the "Winters Doctrine" or to federal reserved rights. Apparently there is some anticipation by the majority that this precedent will effect the adjudication of Indian water rights. Perhaps by analogy it will. However, those cases are not before us.

I concur in the result for the reason that, at the time of the creation of the school trust, the federal government

conveyed to the state, not only the land, but the appurtenant right to develop water necessary for fulfillment of the trust purpose. I specifically disavow the remainder of the majority's opinion.


Justice

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364

EXHIBIT 4
DATE 13 FEBRUARY 2019
HB 286
FILED
JUN 29 2000

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
SHIELDS RIVER BASIN (43A)

IN THE MATTER OF THE ADJUDICATION OF THE) CASE NO. 43A-A
EXISTING RIGHTS TO THE USE OF ALL THE)
WATER, BOTH SURFACE AND UNDERGROUND) 43A-W-042435-00
WITHIN THE SHIELDS RIVER DRAINAGE AREA)
INCLUDING ALL TRIBUTARIES OF THE)
SHIELDS RIVER, IN PARK, MEAGHER AND)
GALLATIN COUNTIES, MONTANA.)

CLAIMANT: Julie C. and Joseph D. Harper, Dennis J. and
L. Darlene Leahy, Richard D. & Gay W. Juhnke

ON MOTION OF THE WATER COURT

OBJECTOR: Montana Department of Natural Resources and Conservation (Trust Lands Division)

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND MEMORANDUM

Procedural Background

On November 10, 1981, Delbert and Bernice Kunnemann ("Kunnemanns") filed Statement of Claim 43A-W-042435-00 with the Montana Department of Natural Resources and Conservation ("DNRC") for an existing water right to 154 miners inches of water (3.85 cfs) diverted from the Shields River in Section 32 of Township 1 North, Range 10 East, M.P.M., to irrigate 65 acres of land in the N1/2 of Section 16 of Township 1 South, Range 10 East, M.P.M. The Shields River Temporary Preliminary Decree was issued in 1988, decreeing the water right as claimed.

The claim was subsequently called in on motion of the Water Court to review the issues of acres irrigated, place of use and flow rate. On March 19, 1992, the Water Master issued a Report concluding that the historical pre-July 1, 1973 flow rate was 3.85 cfs for use on 35 acres of land in the W1/2 of Section 16, 30 acres of land in the N1/2 of Section 16, and 1.94 acres in the

RETURNED BY MAIL
JULY 13 2000
APPLICANT

Subsequently used on state school land
Does not become state property

Krista Lee Evans
Senior Water Rights Coalition
Assoc. of Gallatin Agricultural Irrigators
406-439-2215

KUNNEMANN

SWNESW of Section 4, all in Township 1 South, Range 10 East, Park County.¹ An Order Adopting the Master's Report was filed on April 13, 1992.

On March 13, 1995, the Montana Department of State Lands ("DSL") filed a late objection to "ownership" of the claim, based on the Montana Supreme Court's decision in Department of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948 (1985). As the objection was filed nearly six years after expiration of the objection period, it was docketed to be heard after issuance of the Basin 43A Preliminary Decree.

In 1989, Dennis J. and L. Darlene Leahy ("Leahys" or "Claimants") acquired the land in the NE1/4 of Section 16. In 1995, they filed an Application to Change Place of Use with the DNRC seeking to remove that portion of the claim previously used on school trust land in the W1/2 of Section 16 and thereby use the entire claim on their private lands. On June 19, 1995, the DSL filed an Objection to the Application. On April 22, 1996, DSL's successor, Forestry and Trust Land Management Division, Department of Natural Resources and Conservation ("TLMD"), moved the Water Court for a judgment declaring the State of Montana to be the owner of that portion of the water right claim used on school trust land.

On August 2, 1996, the Court reopened the claim to resolve the issue of ownership. The claim was consolidated into Case 43A-A and, on May 27 and 28, 1997, came on for hearing before C. Bruce Loble, Chief Water Judge. The Leahys were present and represented by A. Suzanne Nellen, attorney at law. The TLMD was present and represented by Richard Bach, attorney at law. Evidence both documentary and testimonial was adduced, and counsel for the parties submitted proposed findings of fact and conclusions of law. Judicial notice was taken of the contents of the claim file.

Based on the evidence, and upon consideration of the respective arguments of counsel, the Court now makes its own:

FINDINGS OF FACT

1. This claim is based on a portion of a water right decreed to J. B. McNiven ("McNiven") in Henwood v. Hodson, Cause No. 2717, by the Montana Sixth Judicial District Court,

¹ The Master's Report concluded that Joseph D. and C. Julie Harper, successors in interest to 1.94 acres of Kunnemann land located in the SWNESW of Section 4, T1S, R10E, M.P.M., are entitled to .25 cfs of this claim for that place of use. The Harper portion of this claim is uncontested.

Park County, Montana, in 1911. (Agreed Facts 4, 6)

2. In 1893, Alexander McNiven and John McNiven posted and filed a Notice of Water Right, pursuant to section 1255, 5th Div. Comp. Stat. of 1887, for 600 inches of water diverted from a point on the Shields River "near the north line of Section 4," in Township 1 South, Range 10 East, Park County, for conveyance by "dam, ditch and flume" for beneficial use on the N1/2 of Section 9, Township 1 South, Range 10 East, Park County.

3. In the Henwood decree of 1911, the District Court decreed the water right noted in Finding of Fact 2 to John McNiven as follows:

[T]he defendant, John McNiven, is the owner of the following lands in Park County, Montana, to wit:

West Half of the South West quarter of Section Four (4), North East quarter of the South West quarter and the South East quarter of the North West quarter of Section Eight (8) and part of the West Half South of the River in Section Nine (9) all in Township One (1) South of Range Ten (10) East.

That the said defendant is the owner of a water right of 450 inches equivalent to a flow of 11 1/4 cubic feet per second of time, appropriated from the waters of Shields River, on the 14th day of August, 1893, which is appurtenant to said land, and that he has a right to divert the same from the said stream at all times when said water is actually needed for irrigating said land, or for other useful and beneficial purposes, provided that said water is not being necessarily used by some other party or parties to this action, whose right to the same is prior to that of the said defendant, as decreed herein.

[emphasis added] ("McNiven decreed water right") (Agreed Facts 3, 5; Joint Exhibit 10; Henwood v. Hodson, Cause No. 2717, issued by Montana Sixth Judicial District Court, Park County, on March 3, 1911; Claim File) The State of Montana was not named as a claimant in the lawsuit.

4. In 1904, John McNiven posted and filed another Notice of Water Right, pursuant to sections 1880 to 1902, Civil Code of 1895, for 100 inches of water diverted from a point on the Shields River "near the north line of Section 4, Township 1 South, Range 10 East, Park County," to be conveyed by "dam, ditch and flume" for beneficial use on the W1/2 of Section 16, Township 1 South, Range 10 East, Park County, this ditch "being an enlargement and continuation of the ditch now owned by the appropriator which is of record in Vol. 1, p. 256, Water Rights,

records of Park County, Montana." The place of use for this filed right was school trust land, which John McNiven began leasing from the State in 1907 or some time thereafter. This filed right was not adjudicated as part of the Shields River Decree in 1911, and no one, including the State of Montana, filed a claim in Montana's statewide general adjudication based on this right until the TLMD filed late Statement of Claim 43A-W-215510-00 with the DNRC in 1996. (Claimants' Exhibits 1, 17)

5. Section 16 is among those sections of public domain reserved in the 1864 Organic Act for "the purpose of being applied to schools," and granted in the 1889 Enabling Act to the State of Montana "for the support of common schools." (Joint Exhibit 3)

6. A field survey of all but the SE corner of Section 16 was completed in 1873, and Plat No. 349, with accompanying notes, was approved by the Office of the U.S. Surveyor General in the same year. Title to Section 16 therefore vested in the State of Montana upon its admission to the Union, even though the patent was not issued to the State until 1943. (Joint Exhibit 3; Judicial Notice of official records on file and of record in the Public Records of the United States Dept. of Interior, BLM, Billings, Montana)

7. On October 29, 1934, the State issued a patent for the NE1/4 of Section 16 to Grace David, who subsequently conveyed the same and the S1/2 of Section 9, "together with ... appurtenances," to Florence and Taylor McNiven. (Joint Exhibit 2) In 1963, Florence McNiven conveyed the NE1/4 of Section 16 (as well as the W1/2 of SW1/4, all of Section 8, and that portion of the N1/2 of Section 9 lying west of the middle of the present channel of Shields River, T1S, R10E, Park County, Montana) to Arnold and Louise Dinsdale, "together with the... tenements, hereditaments and appurtenances," which expressly included "water rights and water ditches, if any, thereto belonging." The Dinsdales also held the lease on school trust land located in the W1/2 of Section 16. (Agreed Fact 8; Joint Exhibits 4, 5, 14 (Letter of Daniel R. Dinsdale, November 18, 1991), and 19; Testimony of Daniel Dinsdale and Delbert Kunnemann)

8. Daniel Dinsdale, their son, stated by letter that prior to July 1, 1973, his father used 154 inches of the water right to irrigate 35 acres of State lease land and 30 acres of private land in the N1/2 of Section 16. He confirmed those statements by testimony and further testified that his father irrigated the leased land above and below Noel Creek out of the McNiven ditch; and his deeded land in Section 16 out of both the McNiven Ditch and the Grannis Ditch. (Agreed Fact 8;

Testimony of Daniel R. Dinsdale; Letter of Daniel R. Dinsdale, November 18, 1991) He testified that when water was short, the water was used on the upper ranch first, and Section 16 was irrigated only if there was enough water left to reach the land.

9. In 1969, the Dinsdales conveyed all their private land to the Kunnemanns, together with all "tenements, hereditaments and appurtenances." Daniel Dinsdale testified that his parents transferred both the private land and the school lease to the Kunnemanns, and that "to his knowledge," all the water rights were intended to transfer with the land. (Agreed Fact 9; Joint Exhibits 6, 20, 21; Testimony of Daniel R. Dinsdale and Delbert Kunnemann; Letter of Daniel R. Dinsdale, November 18, 1991)

10. In 1972, Delbert Kunnemann acquired his own State lease to the land in the W1/2 of Section 16. When water was short, he continued the practice of using the water on the upper ranch first and irrigating Section 16 only when there was enough water to reach the land. Between 1969 and 1988, Kunnemann divided and conveyed tracts of his ranch land and appurtenant water rights to other parties, but retained land in Section 9 and in the NE1/4 of Section 16, together with 154 inches of the water right. Kunnemann continued to use the water right on both his leased and deeded land. Like the Dinsdales, he irrigated the leased land out of the McNiven Ditch both above and below Noel Creek; and his private land adjacent to the leased land out of both the McNiven and Grannis Ditches.

11. On November 10, 1981, Kunnemanns filed a Statement of Claim for 154 inches of the original McNiven decreed water right, with a point of diversion off school trust land and the place of use as the N1/2 of Section 16, Township 1 South, Range 10 East, Park County. Kunnemann testified that his intent with respect to the water right was to "keep the water" for his deeded land, but to "permit" its use on the leased land for as long as he held the lease.

12. When he assigned the school lease to Harry and Alice Williams ("Williams"), Kunnemann did not transfer any portion of the water right to them, but told them they could continue to use his water right on the leased land. When the lease ended, Kunnemann's intent was to continue to use the entire 154 inch water right on his deeded land. In 1991, the Williams attempted to transfer the portion of the water right they used on the school trust land to the DSL. The DSL declined the offer and told the DNRC that the water right belonged to the lessee, because the point of diversion was off the State land. In 1991, the Williams filed an affidavit with the Water Court disclaiming any

ownership interest in the claim. (Agreed Facts 7, 13, 14; Joint Exhibits 12, 21, 25; State's Exhibit 15; Williams letter attached to Affidavit of Harry D. Williams, Sr. and Alice Williams, filed December 10, 1991, Claim and Case Files)

13. In 1989, the Kunnemanns conveyed their land in Section 9 and the NE1/4 of Section 16 to First Security Bank in lieu of foreclosure of a mortgage they had previously granted to the Federal Land Bank. This conveyance was together with "all tenements, hereditaments and appurtenances," and expressly included "all water rights and ditch rights upon or appurtenant to the real property." Kunnemann testified that his intent was to transfer all the water rights with the land. (Joint Exhibits 7, 8, 8b)

14. Shortly thereafter, the bank conveyed the land, "together with all water rights and rights in ditches..." to Rasmussen, who sold the same to the Leahys by contract for deed, dated December 27, 1989. Although the escrowed warranty deed is silent as to appurtenances, water rights, and ditch rights, the Agreement to Sell and Purchase promised that "Seller will transfer all water ... rights owned by and pertaining to said property to Buyer," In 1994, First Security Bank filed a transfer certificate to document their transfer of the water right to the Leahys, which was accepted and filed by the DNRC. Although the Leahys had previously filed a Water Right Transfer Certificate with respect to the transfer from Kunnemanns, it was rejected by the DNRC. As the Leahys' certificate was neither prepared nor signed by Kunnemanns, it does not represent their intent with respect to the water right transfer. (Agreed Fact 9; Letter from First Security Bank, Claimant's Exhibit 12; Claimants' Exhibit 28)

15. The State of Montana did not file an independent claim in Montana's statewide general adjudication effort for any water right used on the W1/2 of Section 16 until 1996, when it filed Statement of Claim 43A-W-215510-00 for 100 miners inches, with a priority date of 1904. During the temporary preliminary decree objection period for Basin 43A, and at the time of the 1992 Master's Report amending the decree, the policy of the DSL was to assert State interest only in water rights that were diverted on and used on State land and not to claim ownership of a water right with a point of diversion off school trust land. According to the TLMD and Tom Hughes, Water Rights Specialist for the TLMD, the TLMD did not amend its policy or begin claiming water rights put to beneficial use on State land regardless of point of diversion until after 1991. (Agreed Facts 1, 2, 10, 11, 12; Joint Exhibit 16; Claimants' Exhibit 1; *see also* Joint Exhibit 17; DNRC records and Case

File)

From the above Findings, the Court now makes the following:

CONCLUSIONS OF LAW

I

The Montana Water Court has exclusive jurisdiction to interpret and determine "existing water rights." §§ 3-7-224 and 3-7-501, MCA; State ex rel. Jones v. Fourth Judicial District, 283 Mont. 1, 6, 938 P.2d 1312 (1997); Baker Ditch Co. v. District Court, 251 Mont. 251, 255, 256, 824 P.2d 260 (1992); and Mildenberger v. Galbraith, 249 Mont. 161, 166, 815 P.2d 130 (1991).

II

Existing water rights were recognized and confirmed in the 1972 Constitution of the State of Montana at Article IX, Section 3. "'Existing right' or 'existing water right' means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." Section 85-2-102(8), MCA. *See generally* In Matter of Adjudication of Water Rights of Yellowstone River, 253 Mont. 167, 173, 174, 832 P.2d 1210 (1992); McDonald v. State, 220 Mont. 519, 525, 722 P.2d 598 (1986). The same constitutional guarantee prevents the State from affecting rights vested at the time the [1972] Constitution was adopted other than through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, Sec. 17, or the general police power, and without affording due process of law, Mont. Const. Art. I, sec. 17. Pettibone, 216 Mont. at 702; *See also* Yellowstone River, *supra*.

III

A claim of an existing water right filed in accordance with 85-2-221, MCA, constitutes *prima facie* proof of its content. § 85-2-227, MCA. The elements of a *prima facie* statement of claim may be overcome by a preponderance of the evidence contradicting and overcoming the claim. When that is accomplished, the burden of proving the claim shifts back to the claimant. *See* analysis of this issue in Memorandum Opinion of the Montana Water Court, Case No. 40G-2, March 11, 1997, which analysis the Court incorporates herein by reference. Therefore, when Kunnemanns filed their Statement of Claim in accordance with § 85-2-227, MCA, and asserted an ownership interest in the original McNiven decreed water right, their claim became *prima facie* proof of its contents, and the burden of contradicting and overcoming the contents of that claim lay

in the State of Montana. Section 85-2-227, MCA.

IV

The State's premise that "because this involves school trust land, the holding in Department of State Lands v. Pettibone ... is applicable," is incorrect. The holding in Pettibone applies only to water rights diverted or developed on and appurtenant to school trust land. Pettibone, 216 Mont. at 376. Therefore, the State may not presume that Kunnemann was acting on behalf of the State of Montana when he used part of his water right to irrigate school trust land, or that the water right necessarily became appurtenant to the school trust land and owned by the State of Montana. Pettibone, 216 Mont. at 372-373; Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 83, 290 P. 255 (1930). The water right used in this claim was diverted and developed off school trust land and was used on private land. Accordingly, the rules with respect to the ownership of appropriations made on and for the public domain or private land are more applicable to this case.

V

When J.B. McNiven, the Claimants' predecessor in interest, diverted water in 1893 from the Shields River on non-school trust land and conveyed it by "dam, ditch, and flume" to irrigate his private land in Sections 4, 8, and 9, Township 1 South, Range 10 East, Park County, Montana, he acquired a positive, certain, and vested property right, which was subsequently decreed in his name and appurtenant to his private land. Pettibone, 216 Mont. at 375. *See also* Yellowstone River, *supra*. Neither he, nor his successors in interest, may be divested of that property right except through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, Sec. 17, or the general police power, and without affording due process of law, Mont. Const. Art. I, sec. 17. Pettibone, 216 Mont. at 375.

VI

When the owners of this vested water right changed its place of beneficial use from time to time to other private land they owned, *e.g.* 30 acres in the NE1/4 of Section 16, the water right also became appurtenant to the new place of use, because there was no evidence of any intent to the contrary, and no other water users alleged or proved any injury as a result of these changes. §89-803, RCM (1947); Maclay v. Missoula Irrigation District, 90 Mont. 344, 353, 3 P.2d 286 (1931).

VII

When the owners of this vested water right temporarily changed its place of use from time to time to school trust land they leased in the W1/2 of Section 16, the water right was used in gross. No part of the water right permanently attached as an appurtenance to the school trust land owned by the State of Montana. There was no privity of title between the owners of the water right (McNiven and successors) and the owner of the school trust land (State). Any use of the water right on school trust land leased by the owners of the water right was intended to be temporary and with the owners' permission only. Title to the water right was intended to remain with the lessees and appurtenant to the private land on which it was beneficially used. See e.g. Maclay, 90 Mont. at 353-354; Yellowstone Valley, 88 Mont. at 82; St. Onge v. Blakeley, 76 Mont. 1, 18-19, 245 P. 532 (1926); and Smith v. Denniff, 24 Mont. 20, 27-28, 60 P. 398 (1900).

VIII

As there was no severance or reservation of the water right in the chain of title conveying the 30 acres in the NE1/4 of Section 16 by mesne conveyance to the Leahys, or other evidence of intent to sever the water right from the land, all but the Harpers' portion of the right ultimately transferred to the Leahys by deed as an appurtenance to the land. §85-2-403(1), MCA; Yellowstone Valley, 88 Mont. at 84.

IX

There was no intentional or voluntary waiver of known rights by the Leahys or their predecessors at either the time of the original temporary preliminary decree or subsequent amendment by the Water Court, and therefore, the Court denies the State's claim of waiver. Estate of Pelzman, 261 Mont. 461, 863 P.2d 1019 (1993). As the State failed to establish all the elements of judicial estoppel with respect to the Leahys' asserted positions in this case, the Court also denies the State's claim of judicial estoppel. Caekaert v. State Fund, 268 Mont. 105, 885 P.2d 495 (1994); Fiedler v. Fiedler, 266 Mont. 133, 879 P.2d 675 (1994).

X

Dennis J. and L. Darlene Leahy, and Julie C. and Joseph D. Harper, are the current owners of Claim No. 43A-W-042435-00.

XI

Having decreed ownership of this claim in the Leahys and Harpers, the Court declines

to address the Leahys' alternative claims of Waiver and Estoppel.

MEMORANDUM

The Legal Issue

The State of Montana filed this action to obtain a declaratory judgment adjudicating the State of Montana to be the owner of that part of Claim No. 43A-W-042435-00 historically used on school trust land in the W1/2 of Section 16. The TLMD asserts three theories in support of its motion. The first theory is based on the holding and rationale of the Montana Supreme Court in Department of State Lands v. Pettibone. The second and third theories are based on waiver and judicial estoppel. The Leahys (successors to the Kunnemanns) contest the State's motion and theories by distinguishing the Pettibone decision and basing their ownership on the doctrine of appurtenancy as interpreted and applied by the Montana Supreme Court in those cases involving water rights diverted and used on the public domain.² In addition, the Leahys contend that by failing to timely file a claim to the water, or even timely filing an objection to the claim, the State of Montana has now waived its right to do so.

The legal issue before the Court, therefore, is as follows:

Who is the owner of a water right diverted on the public domain or private land and decreed by a district court to be appurtenant to private land, when part of that water right is subsequently used for beneficial purposes on State school trust land?

Discussion

Department of State Lands v. Pettibone

The TLMD argues that when Kunnemanns used a portion of the 1893 McNiven decreed water right to irrigate the school trust land they were leasing from the State of Montana, they were acting on behalf of the State, and, upon its beneficial use thereon, that portion of the water right attached and became appurtenant to the Montana school trust land and owned by the State of Montana. The TLMD supports its argument by citing the holding of the Department of State Lands v. Pettibone.

² See e.g. Castillo v. Kunnemann, 197 Mont. 190, 642 P.2d 1019 (1982); Maclay v. Missoula Irr. Dist., 90 Mont. 344, 3 P. 2d 286 (1931); Yellowstone Valley Co. v. Assoc. Mort. Investors, 88 Mont. 73, 290 P. 255 (1930); St. Onge v. Blakeley, 76 Mont. 1, 245 P. 532 (1926); Lensing v. Day & Hansen Security Co., 67 Mont. 382, 215 P. 999 (1923); Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334 (1905); Hays v. Buzard, 31 Mont. 74, 77 P. 423 (1904); Smith v. Denniff, 24 Mont. 20, 60 P. 398 (1900); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Woolman v. Garringer, 1 Mont. 535 (1872); and Donnell v. Humphries, 1 Mont. 518 (1872).

Twenty-three water rights were involved in the Department of State Lands v. Pettibone appeal. 216 Mont. at 365. Four rights were for groundwater wells developed and used wholly on school trust land. One right was for a groundwater well which straddled the border between trust land and private land and was used on both. Three rights were in developed springs located and used on trust land. Thirteen of the rights were for diversions from streams on trust land for use on trust land. One water right was in a reservoir on trust land for stockwater use on both trust land and private land. One right was for a diversion on trust land for irrigation on both trust land and private land. All of the water rights were diverted, developed, and perfected on school trust land as "use rights" after the original appropriators acquired their leases from the State of Montana.

The Montana Supreme Court focused its analysis and decision on the special character of the land as "school trust land" and the role of the State of Montana as "trustee" of those lands. *See generally, Pettibone*, 216 Mont. at 365-366, 368-371, 375. The Court found that "the State holds these lands subject to the school trust. The essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such property does so 'subject to the trust.'" *Ibid.* at 375. The Court distinguished school trust land from the public domain, private land, and other public land in general, and applied three important principles previously articulated by the United States Supreme Court in school trust land cases: (1) trusts created by the enabling acts are similar to private charitable trusts; (2) the enabling acts creating school trusts must be strictly construed according to fiduciary principles; and (3) enabling acts, in general, preempt State law and constitutions. *Ibid.* at 369, *citing Trustees of Vincennes University v. State of Indiana* (1852), 55 U.S. 268; *Springfield Township v. Quick* (1859), 63 U.S. 56; and *Andrus v. Utah* (1980), 446 U.S. 500.

The Pettibone Court noted the tradition of both the United States Supreme Court and the Montana Supreme Court of acknowledging and protecting the essential trust nature of school land and the necessity to preserve the value of the trust corpus for its intended beneficiaries. The Court's analysis focused particularly on the school trust principles applied in Lassen v. Arizona, 385 U.S. 458 (1967) and Jerke v. State Dept. of Lands, 182 Mont. 294, 597 P.2d 49 (1979), from which it drew and applied the following two rules:

"First, an interest in school land cannot be alienated unless the school trust receives adequate compensation for that interest. Water that is appurtenant to the school lands is an interest for which the trust must

receive compensation.

Second, any law or policy that infringes on the state's managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land."

Ibid. at 371.

Based on these special school trust land rules, the Pettibone Court distinguished school trust land cases from public domain, public trust, and federal reserved water right cases. The Court found that a special relationship exists between the lessees of school trust lands in Montana and the State of Montana as trustee of those lands. Ibid. at 368. It is a relationship in which:

The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State....The lessee, under the terms of the lease, is simply entitled to the use of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefore.

Ibid. (emphasis added) *See also* 375-376.

As the lessee of school trust land is acting on behalf of the State when making appropriations on and for school trust sections, title to the water right vests in the State, not the lessee. Ibid. at 368, 375-376. Under Montana law, where the owner of a water right also owns the land on which the water is put to beneficial use, the water right is usually deemed to be incidental or appurtenant to the land, and remains appurtenant thereto until severed from the land by the owner of the water right. Section 70-15-105, MCA. *See discussion, infra*, at pp. 16-18. Therefore, the Pettibone Court deemed the 23 water rights at issue to be appurtenant to the school trust land. Ibid. at 368. As an interest in the land (trust), they could not be surrendered by the State without receiving fair market value for the rights. Ibid. at 371, 373. As none of the lessees in Pettibone alleged payment of consideration to the State apart from the lease payments, the Court concluded that all 23 water rights were owned by the State of Montana:

We hold that the lessee, under the terms of the school lease, is entitled to the use of water appurtenant to the leased land. The State is the beneficial user thereof, and its duty as trustee of the school lands prohibits it from alienating this interest in the land absent full compensation therefor. Absent such compensation, the title to the water rights in this case vest in the State.

Ibid. at 376.

Pettibone is Distinguishable

Title to the school trust land involved in this case vested in the State of Montana upon its admission to the Union, even though the patent was not issued to the State until 1943.³ However, as shown by the findings, this claim is based on a water right diverted in 1893 from a point on the Shields River off school trust land for use on land owned by the appropriator. It was subsequently decreed in 1911 to be owned by the appropriator and appurtenant to his private land. Therefore, it was already a positive, certain and vested property right before it was ever used on school trust land. For such a water right, a different set of rules applies. As the Pettibone Court, itself, emphasized:

Respondents cite several cases that appear to articulate a contrary rule. The first, *Smith v. Denniff* ... is distinguishable in the fact that it concerned water appropriations made ... on federal lands who diverted water for use on the public domain....As discussed above, school trusts lands are subject to a different set of rules than other public lands."

* * *

Secondly they cite Hayes v. Buzzard [sic]... for the rule that the question of whether water is appurtenant to the underlying land turns upon the intention of the appropriator. Again, Hays arose on public domain land, not school trust land. This Court recognized that distinction....

Pettibone, 216 Mont. at 372-373, 702 P.2d 948. (emphasis added)

Prior Appropriation on the Public Domain

Water law in the State of Montana was born in the rough and primitive gold fields of California, where an enforceable water right was acquired simply by taking the waters of the public domain and putting them to beneficial use, with first in time being first in right.⁴ Those

³ In United States v. Wyoming, the United States Supreme Court held that: "The interest of the State vests at the date of its admission into the Union only as to those sections which are surveyed at that time and which previously have not been disposed of by the Federal Government." 331 U.S. 440, 443-444, 91 L. Ed. 1590, 1593 (1946). See also Clemmons v. Gillette, 33 Mont. 321, 326, 83 P. 879 (1905).

⁴ See generally Matter of Dearborn Drainage Area, 234 Mont. 331, 340, 766 P.2d 228 (1988); Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921); Maynard v. Watkins, 55 Mont. 54, 173 P. 551 (1918); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Smith v. Duff, 39 Mont. 382, 389, 102 P. 984 (1909); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897); Kleinschmitt v. Greiser,

customs ripened into well recognized rules that were subsequently adopted and given the force of law by Montana's territorial and State legislatures and courts.⁵ From an early date, the United States Supreme Court acknowledged that Montana's water law was fixed and regulated by these local customs, rules and court decisions,⁶ and in 1866, they received the formal confirmation of Congress.⁷ Broder v. Natoma Water and Mining Co., 101 U.S. 274 (1879); Atchison v. Peterson, 87 U.S. 507, 512-513 (Mont. Terr. 1874).

As the territory became increasingly settled, the great value and complexity of water use became more apparent, Miles v. Butte Electric Co., 32 Mont. 56, 67, 79 P. 549 (1905), and the sparse descriptions and applications of the early doctrine were augmented by interstitial rulings and dicta of the Montana Supreme Court.⁸ By 1900, the Montana Supreme Court described the appropriation doctrine in Montana in more complete terms as follows:

14 Mont. 484, 37 P. 5 (1894); Sweetland v. Olsen, 11 Mont. 27, 27 P. 339 (1891); Woolman v. Garringer, 1 Mont. 535 (1972); King v. Edwards, 1 Mont. 235, 239 (1870). See also Atchison v. Peterson: By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the US, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property, 87 U.S. 507, 510 (Mont. Terr. 1874); Basey v. Gallagher: The views [in Atchison v. Peterson] expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and territories by the custom of miners or settlers or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial use, 87 U.S. 670, 682 (Mont. Terr. 1874); and Broder v. Water Company, 101 U.S. 274 (Cal. 1879).

⁵ See e.g. King v. Edwards, 1 Mont. 235, 239 (1870) ("The mining customs of any particular mining district [in Montana] have the force and effect of laws, or, in other words, are laws.") See also Bailey v. Tintinger, 45 Mont. 154, 166, 122 P. 575 (1912) ("These customs formed a part of our unwritten law, or, as it might more aptly be termed, the common law of this country as distinguished from the common law of England.")

⁶ Basey v. Gallagher, 87 U.S. 670 (Mont. Terr. 1874); Atchison v. Peterson, 87 U.S. 507 (Mont. Terr. 1874).

⁷ Section 9 of the Act of 1866 provided that: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same...."

⁸ As Justice Holloway pointed out in Mettler v. Ames: "It may be conceded that in each instance the observations were not necessary to the decision rendered, but they do, respectively, represent the views of the distinguished jurists who in the early days were largely instrumental in formulating the public policy of Montana respecting this subject." 61 Mont. 152, 169, 201 P. 702 (1921). Thus, although not necessarily of precedential value, it is certainly instructive and persuasive.

We recognize the doctrine that right to the use of water may be owned without regard to the title to lands upon which the water is to be used; that is, that a right to the use of water is a possessory one, that may be obtained by actual appropriation and diversion, perfected by application of the water so appropriated to a beneficial use then present or contemplated, and made before appropriation and use by another. But, as every appropriation must be made for a beneficial or useful purpose (section 1881, Civil Code), it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof....

Toohy v. Campbell, 24 Mont. 13, 17-18 (1900). (emphasis added)

When appropriated on the public domain in compliance with law, legal title to the water right vested in the appropriator. It was "a positive, certain, and vested property right," of which the appropriator could be divested only through the exercise of Constitutionally provided powers, such as eminent domain or the general police power, with due process of law. Smith v. Denniff, 24 Mont. 20, 27, 60 P. 398 (1900). See also In Matter of Adjudication of Yellowstone River Water Rights, 253 Mont. 167, 173-174, 832 P.2d 1210 (1992);⁹ Pettibone, 216 Mont. at 375; Osnes Livestock Co. v. Warren, 103 Mont. 284, 294, 62 P.2d 206 (1936); and St. Onge v. Blakely, 76 Mont. 1, 18, 245 P. 532 (1926). Legal title to the land upon which such a water right was used or intended to be used did not affect the appropriator's title to the water right. Smith, 24 Mont. at 29. The above principles were summarized by the Montana Supreme Court in St. Onge v. Blakely as follows:

The right to use water ... is a possessory right which may be acquired by appropriation and diversion for a beneficial use; such a right can be acquired by a squatter on public lands, or one holding lands under contract for its purchase (citations omitted) and, once the right is acquired, its owner cannot be deprived thereof by a conveyance of the land by the land owner. (citations omitted).

76 Mont. at 18. (emphasis added)

⁹ The Court takes judicial notice that the Montana Supreme Court has found that: "While these [water] rights are protected against unreasonable state action....they have not been granted indefeasible status." In Matter of Adjudication of Existing Rights in Mussellshell River Drainage Area, 255 Mont. 43, 48, 840 P.2d 577 (1992), citing to In Matter of Adjudication of Yellowstone River Water Rights, 253 Mont. 167, 173-174, 832 P.2d 1210 (1992).

Attachment of Water Rights to Land

Mere possession of a water right originated by another does not establish ownership of the water right. St. Onge, 76 Mont. at 19; Kenck v. Deegan, 45 Mont. 245, 249, 122 P. 746 (1912). Privity of title must exist between the claimant and the original appropriator of the water right. Ibid. at 19. *See also* Head v. Hale, 38 Mont. 302, 308, 100 P. 222 (1909), and Hays v. Buzard, 31 Mont. 74, 82, 77 P. 423 (1904). Privity of title may be established by (1) an express conveyance of the water right, Castillo v. Kunnemann, 197 Mont. 190, 197-198, 642 P.2d 1019 (1982); (2) a contractual relationship with the original appropriator, together with immediate possession of the land and water, St. Onge, 76 Mont. at 12-14; or (3) an express conveyance of land to which the water right is appurtenant. Spaeth v. Emmett, 142 Mont. 231, 237, 383 P.2d 812 (1963); Hays, 31 Mont. at 82; and Smith, 24 Mont. at 28.

It is well settled that a water right may pass as an appurtenance to land in Montana. 1 Wiel, Water Rights in the Western States §550 (1911). *See also* 1 Hutchins, Water Rights Laws in the Nineteen Western States 469 (1971). "[W]hether a water right passes as an appurtenance involves two questions: (a) Whether the water right is an appurtenance, and (b) whether, being such, it was intended to pass. Both of these are questions of fact in each case." Ibid. (emphasis added) *See e.g.* Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 83, 290 P. 255 (1930); Lensing v. Day & Hansen Security Co., 67 Mont. 382, 384, 215 P. 999 (1923); Custer Consolidated Mines Co. v. City of Helena, 52 Mont. 35, 43, 156 P. 1090 (1916); Bullerdick v. Hermsmeyer, 32 Mont. 541, 550, 81 P. 334 (1905); Donnell v. Humphries, 1 Mont. 518, 524-525 (1872).

Montana statute has long provided that "[a] thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit...." Section 70-15-105, MCA, preceded by § 67-211, RCM 1947. Thus, the Montana Supreme Court has directed that "[w]hen a water right is acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, it is an appurtenance thereto and, as such, passes with the conveyance of the land, unless expressly reserved from the grant." Yellowstone, 88 Mont. at 84. *See also* Castillo, 197 Mont. 196; Adams v. Chilcott, 182 Mont. 511, 518, 597 P.2d 1140 (1979); Schwend v. Jones, 163 Mont. 41, 515 P.2d 89 (1973); Lensing, 67 Mont. at 384; and Sweetland v. Olsen, 11 Mont. 27, 29, 27 P. 339 (1891).

These directives, however, do not propound an inflexible rule, for the Court has also found that "the fact that [a water right] has been used at this or that place, or upon particular land, will not of itself determine its character as an appurtenance." Hays, 31 Mont. at 82. *See also* Hutchins, *supra*, at 471. As the appropriator and his successor are entitled to change the place of use and to sever and reserve or convey the water right apart from the land on which it is used, a legally acquired water right is akin to an easement in gross, which, according to circumstances, may or may not be an easement annexed or attached to certain lands as an appurtenance thereto. Maclay, 90 Mont. at 353. Therefore, whether a water right attaches as an appurtenance to land in Montana is a question of fact, and the burden of proof is on the party asserting ownership by appurtenancy. Yellowstone Valley, 88 Mont. at 82; Custer Consolidated Mines, 52 Mont. at 43; Donnell, 1 Mont. at 524-525.

Given its similarity to an easement in gross, unity of title between the owner of a water right and owner of the land is required before the Montana Supreme Court will *deem* a water right appurtenant to land pursuant to the statute. Smith, 20 Mont. at 27-28. Where there is no such unity of title, a water right is not deemed appurtenant to land until either the owner of the water right obtains title to the land or conveys the water right to the owner of the land, or the facts and circumstances of the case indicate *intent* on the part of the water right owner to make the water appurtenant to the land. Smith, 20 Mont. at 28.¹⁰ The Smith Court applied this principle in a landlord-tenant situation as follows:

Section 1078 [now 70-15-105, MCA] may not be interpreted to mean that a water right acquired by prior appropriation by one who has only possessory title to the land, although with the intent at the time to use the water upon such land, shall, by the mere act of using it as

¹⁰ In the case of a water right appropriated by a squatter in possession of land taken in good faith upon the public domain, the water right could become appurtenant to land before legal title (patent) was acquired, if the facts and circumstances established that the claimant had appropriated and used the water for the benefit of the land, and that he intended the water right to become appurtenant to the land. *See e.g.* Cook v. Hudson, 110 Mont. 263, 278, 103 P.2d 137 (1940) (overruled on other grounds by Grimesly v. Spencer, 206 Mont. 184, 198, 670 P.2d 85 (1983)); Geary v. Harper, 92 Mont. 242, 248, 12 P.2d 276 (1932); St. Onge 76 Mont. at 14; Wood v. Lowney, 20 Mont. 273, 277, 50 P. 794 (1897); and McDonald v. Lannen, 19 Mont. 78, 85-86, 47 P. 648 (1897).

For further applications demonstrating the flexibility of the rule and focus on the intent of the grantor, *see* Maclay, 90 Mont. at 353-354; Yellowstone Valley, 88 Mont. at 82; St. Onge, 76 Mont. at 18-19; Warren v. Senecal, 71 Mont. 210, 219, 228 P. 71 (1924); Lensing, 67 Mont. at 384; Sayre v. Johnson, 33 Mont. 15, 20, 81 P. 389 (1905); Bullerdick, 32 Mont. at 553-554; Hays, 31 Mont. at 82-83; Toohey v. Campbell, 24 Mont. at 17-18; and Donnell, 1 Mont. at 531-532.

intended, become inseparably attached as an appurtenance, and the appropriator thereby lose his water right. Such an interpretation would not only violate recognized custom and legal principles, but would render inoperative the provisions of Section 1882 [change in place of use] of the Civil Code.

Smith, 24 Mont. at 30. The Smith Court therefore concluded that:

The common-law rule that an easement acquired by a tenant as an appurtenant to the land inures to the benefit of the landlord upon the expiry of the tenancy (citations omitted) is, for the reasons we have stated, inapplicable to cases arising under the statutes in respect of prior appropriation of water rights.... Ibid.

Transfer of Appurtenant Water Rights

Whether a water right appurtenant to particular land passes with a conveyance of the land is also a question of fact. Yellowstone Valley, 88 Mont. at 84. Montana statute provides that "[t]he transfer of a thing transfers also all its incidents unless expressly excepted." § 70-1-520, MCA. Accordingly, the Montana Supreme Court has held that:

[T]he governing rule is that everything essential to the beneficial use and enjoyment of the property conveyed is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.

Yellowstone Valley, 88 Mont. at 84.

The right of a claimant to title to a water right based on appurtenance, therefore, typically depends on the interpretation of deeds furnishing the chain of title. Hays, 31 Mont. at 82.¹¹ "In a conveyance of a water right or any other property, it is the intent of the parties, so far as the same has been lawfully expressed, which must control the courts in the construction of the instrument by which the property is conveyed." Lensing, 67 Mont. at 382-383. See also Yellowstone

¹¹ In the case of a water right appropriated by a squatter in possession of land taken in good faith upon the public domain, the Court has held that "no deed was necessary, for one who has settled upon and is in possession of public lands of the United States may convey his right in the same, together with a water right appurtenant thereto, orally and for or without consideration, to one who takes possession thereof." St. Onge, 76 Mont. at 14. See also Cook v. Hudson, 110 Mont. 263, 278, 103 P.2d 137 (1940) (overruled on other grounds by Grimesly v. Spencer, 206 Mont. 184, 198, 670 P.2d 85 (1983)); Gearv v. Harper, 92 Mont. at 248; Wood v. Lowney, 20 Mont. at 277; and McDonald v. Lannen, 19 Mont. at 85-86.

Valley 88 Mont. at 84.¹² When the deed does not specify the particular appurtenant right intended to be conveyed, extrinsic evidence must be used to establish it. Bullerdick, 32 Mont. at 550; Hays, 31 Mont. at 82; and Donnell v. Humphreys, 1 Mont. at 526. The question becomes: "What rights ... does the [claimant] appear to have acquired in the water under that deed, in light of the facts as they then existed, and the behavior of the parties with reference to it?" Hays, 31 Mont. at 82.

Water Right Claim No. 43A-W-042435-00

The 450 miner's inches of water on which this claim is based was diverted by Alexander and John McNiven from the Shields River at a point over two miles off school trust land for the irrigation of private land pursuant to the Laws of 1887. It was subsequently adjudicated in the 1911 Shields River Decree as owned by J.B. McNiven and appurtenant to McNiven's private land. Having been appropriated and perfected in compliance with Montana law, it became a vested property right, and neither McNiven, nor his successors in interest, could be divested of it for public use except through constitutional means.

The Dinsdales (Kunnemanns' immediate predecessors) acquired the McNiven land, which now included the NE1/4 of Section 16, by mesne conveyance in 1963. As there was no evidence of intent to sever or reserve the water right in the conveyances, the appurtenant water right transferred to the Dinsdales with conveyance of the land. The Dinsdales also leased school trust land in the W1/2 of Section 16, and they used 154 inches of the decreed water right to irrigate both 30 acres of their private land in the NE1/4 and 35 acres of the school trust land, moving the water between the two tracts as needed and as conditions permitted.

As the Dinsdales owned both the water right and the private land in the NE1/4 of Section 16, and there was no evidence of a contrary intent, that portion of the water right used to irrigate the 30 acres became appurtenant to it. Although the water right was used from time to time on school trust land, no part of the water right became appurtenant to that school trust land, because there was no unity or privity of title to the land and water between the Dinsdales and the State of Montana, and no evidence of intent to make the water right appurtenant to the school trust land. Even though the Dinsdales were lessees of the school trust land, they were not acting on behalf of

¹²

For rules of construction, *see generally*: Van Hook v. Jennings, 56 St. Rep. 767, 768, 295 Mont. 409, 412-413, 983 P.2d 995 (1999); Morningstar Enterprises, Inc. v. Grover, 247 Mont. 105, 111, 805 P.2d 553 (1991); and Musselshell Farming & Livestock Co. v. Cooley, 86 Mont. 276, 283 P. 213 (1929).

the State when they succeeded to ownership of the water right, or when they used it to irrigate the school trust land. Their intent was merely to temporarily change the place of use of their private, vested water right. When the Dinsdales conveyed the land in the NE1/4 of Section 16 to the Kunnemanns without a reservation or exception of the water right, their intent was to transfer the water right with the land as an appurtenance to it. The Kunnemanns also succeeded to the Dinsdales' lease of the school trust land and continued the practice of using the water to irrigate both the 30 acres of private land in the NE1/4 and the 35 acres of school trust land. Like their predecessors, even though the Kunnemanns were lessees of the State and temporarily used the water from time to time on school trust land, they intended to keep their vested right attached as an appurtenance to their private land, including the 30 acres in the NE1/4 of Section 16. When the Kunnemanns transferred their land to the bank in lieu of foreclosure, they intended the 154 inch water right to transfer with the land. When the Leahys subsequently acquired the land by mesne conveyance without a severance or reservation of the water right, they acquired all but the Harpers' portion of the 154 inch water right appurtenant to it.

Waiver and Judicial Estoppel

As an alternative theory, the State of Montana argues that the Leahys waived their right to object to the State's claim of ownership of a portion of Claim 43A-W-042435-00 by failing to raise or object to the issues of (1) total irrigated acreage on State land, (2) the effect of the 1904 right, and (3) the validity of Kunnemanns' filing on the State land at the time of the temporary preliminary decree and subsequent Master's Report amending the decree. The State also appears to argue that the doctrine of judicial estoppel prevents the Leahys from now asserting ownership of the that part of the water right claimed and decreed for use on school trust land, after they acquiesced to the Findings of Fact set forth in the Master's Report, filed March 19, 1992. An Order Adopting the Master's Report was filed on April 13, 1992, which amended the Temporary Preliminary Decree for the Shields River Basin (43A).

Waiver is an equitable doctrine, applicable only where there is intentional or voluntary relinquishment of a known right, claim or privilege. Estate of Pelzman, 261 Mont. 461, 465, 863 P.2d 1019 (1993). The Leahys did not waive their right to object to DSL's interest in this claim for three reasons.

First, Leahys or their predecessors were not statutorily required to file objections to

any water right claim contained in the Shields River Temporary Preliminary Decree when the decree was issued in 1988, because a subsequent preliminary decree eventually will be issued. A person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree issued before March 28, 1997. Section 85-2-233(1)(c), MCA.

Second, the Leahys or their predecessors could not have waived their right to object to DSL's interest in this claim, because both Leahys and the DSL were unaware of DSL's interest in this claim until long after the 1989 deadline to file objections to claims in the Shields River Temporary Preliminary Decree expired. Even though the Supreme Court issued its Pettibone decision in 1985, the DSL affirmatively declined to accept a portion of the water right claim when it was offered in 1990 to DSL by the Williams, State lessees. The DSL, now TLMD, readily admits in its proposed finding of fact 28 that it was "apparently confused" as "to whether it had a right to claim a portion of this water right, since it was diverted off of state land" and that it was only "sometime after 1991 that the state began asserting an interest in all water rights perfected on state lands regardless of place of diversion." (Trust Lands' Brief and Amended Proposed Findings, Conclusions and Order, page 9. See also proposed finding 11 at page 5.) If the DSL was so "confused" over its ownership interest in this claim that it actually declined to accept the 1990 offer from Williams, then Leahys or their predecessors certainly cannot be said to have knowingly waived any right to object to DSL's ownership interest in this claim in 1989.

Third, the statement of claim is *prima facie* proof of its content. Section 85-2-227(1), MCA. The claim does not identify the State as the owner. Therefore, the burden to contest ownership was on the State and not on the Leahys or their predecessors. See Conclusion of Law III.

Consequently, without an obligation to object or notice of the State's claim of ownership, the Leahys or their predecessors cannot have intentionally or voluntarily waived their right to object to the State's ownership interest in this claim.

The TLMD argument on the doctrine of judicial estoppel is also not applicable. The doctrine estops litigants from asserting inconsistent or contradictory positions in separate litigation. Caekaert v. State Fund, 268 Mont. 105, 115, 885 P.2d 495 (1996). The doctrine only applies to those statements that have misled the adverse party and if accepted would injuriously affect the adverse party. Fieldler v. Fieldler, 266 Mont. 133, 139-140, 879 P.2d 675 (1994). "Stated simply, it is a rule which 'estops a party to play fast-and-lose with the courts' (citation omitted)." Fieldler,

266 Mont. at 140.

The TLMD argues that when the Leahys offered evidence in 1992 to the Water Master by affidavit and attached Daniel Dinsdale's 1991 letter showing the historical irrigable acreage under the water right on both their deeded land and the State school trust land, they acquiesced in the extent of irrigable acreage under the water right appurtenant to the State land as well as their own land and are estopped from asserting an inconsistent position now. (Trust Lands' Brief and Amended Proposed Findings, Conclusions and Order at page 13). The TLMD presented no evidence that it was misled by Leahys' prior positions.

The Leahys' 1992 effort does not contradict their current court filings. In their 1992 affidavit, the Leahys claimed to be the owners of Water Right 43A-W-042435-00 with a flow rate of 3.85 [cfs], which they purported was used on 30 acres of deeded land in the N1/2 of Section 16. To this affidavit was attached a letter from Daniel Dinsdale that his father had "154 inches of water, rate of flow was 3.85," [cfs] to irrigate 30 acres of deeded land in the N1/2 of Section 16 and 35 acres of leased land in the W1/2 of Section 16; and that all of his father's water rights were intended to transfer with the land. In 1991, Harry and Alice Williams filed their affidavit, by which they purported to be the owners of that portion of the water right used on school trust lands. In 1992, the Water Master relied on these affidavits and found that this 3.85 cfs claim was beneficially used, prior to July 1, 1973, on the 65 acres described in the Dinsdale letter. The State's claim of ownership was not an issue.

In the proceedings subsequent to 1992, the Leahys have not proposed a different historical place of use. Leahys merely petitioned the DNRC for authorization to remove a portion of their claimed water right historically used on school trust lands and to transfer the beneficial use of that water to their private land. As a result, they have been required to participate in this proceeding to defend their ownership of a portion of the claim. Their current position is not inconsistent with their previous position and did not mislead the TLMD. Whatever confusion and inconsistency that has arisen regarding ownership of this water right claim mostly results from TLMD's change in policy after 1991, the resulting presentation of a complex legal issue, a water right transfer process that could only raise a legal issue and not solve it, and a cumbersome procedure to bring the issue to the Water Court for resolution.

Conclusion

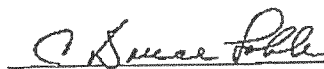
The State of Montana has failed to meet its burden of contradicting and overcoming the Leahys' claim of ownership. As this water right was diverted, developed and perfected on private land, and decreed to be privately owned and appurtenant to private land before it was used on school trust land, the holding in Department of State Lands v. Pettibone does not apply.

The facts and circumstances here show that the water was intended to be and was appurtenant to private land, including 30 acres in the NE1/4 of Section 16. Temporary use of the water on school trust land did not make the water appurtenant to the school trust land, because there was no unity or privity of title between the successive owners of the water right and the owner of the school trust land, no intent to make the water appurtenant to the school trust land, and no conveyance of the water right to the State in writing. When the Leahys became successors to the private land without a severance or reservation of the water right, they acquired the 154 inch water right appurtenant to the land, less only that portion previously conveyed to the Harpers.

Just as it would make no sense to allow each succeeding tenant to appropriate and "walk off" with one water right after another diverted and developed on and for, and appurtenant to, school trust land, it would make no sense to allow the State to "take" one vested right after another from unsuspecting lessees who merely intend to apply their vested water rights for temporary use on school trust land. While school trust land may temporarily benefit from a lessee's private water right, TLMD is not entitled therefore to convert that fortuitous effect into a permanent asset of the trust estate. While the State's fiduciary role as charitable trustee clearly prohibits it from surrendering interests of the trust estate without receiving full market value, a private existing water right such as this right was never an "interest" of the trust estate to begin with and should not be considered part of its value.

The TLMD's motion for declaratory relief determining the State of Montana to be the owner of that portion of Claim 43A-W-042435-00 used on school trust land in Section 16, Township 1 South, Range 10 East, M.P.M., is **DENIED**.

DATED this 29 day of JUNE, 2000.



C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Lori M. Burnham Beck, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Dennis J and L Darlene Leahy
3989 Salt Spring Dr.
Ferndale WA 98248

Joseph D & Julie C Harper
HC 85 Box 4275
Livingston MT 59047

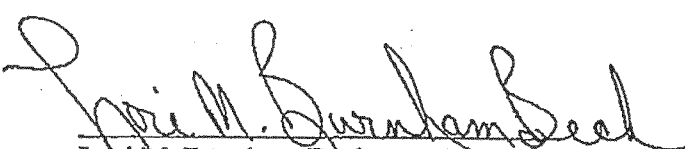
A. Suzanne Nellen, Attorney
1800 W Koch Suite 5
Bozeman MT 59715

Tommy H. Butler, Attorney
Dept. of Natural Resources and Conservation
PO Box 201601
Helena MT 59620-1601

Richard D. & Gay W. Juhnke
PO Box 1327
Livingston MT 59047

Courtesy Copy to:
Richard E. Bach
837 Catherine Ave
Holly Hill FL 32117

DATED this 29 day of June, 2000.


Lori M. Burnham Beck
Clerk of Court

Montana Code Annotated 2017

THE CONSTITUTION OF THE STATE OF MONTANA

ARTICLE X. EDUCATION AND PUBLIC LANDS

Part X. EDUCATION AND PUBLIC LANDS

Public Land Trust, Disposition

Section 11. Public land trust, disposition. (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

(2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

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Krista Lee Evans
Sr WRC / AGA
406-439-2215

MCA Contents / THE CONSTITUTION ... / ARTICLE X / Part X / Section 3 Public school...

Montana Code Annotated 2017

THE CONSTITUTION OF THE STATE OF MONTANA

ARTICLE X. EDUCATION AND PUBLIC LANDS

Part X. EDUCATION AND PUBLIC LANDS

Public School Fund Inviolate

Section 3. Public school fund inviolate. The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion.

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Montana Code Annotated 2017

THE CONSTITUTION OF THE STATE OF MONTANA

ARTICLE IX. ENVIRONMENT AND NATURAL RESOURCES

Part IX. ENVIRONMENT AND NATURAL RESOURCES

Water Rights

Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

STATE

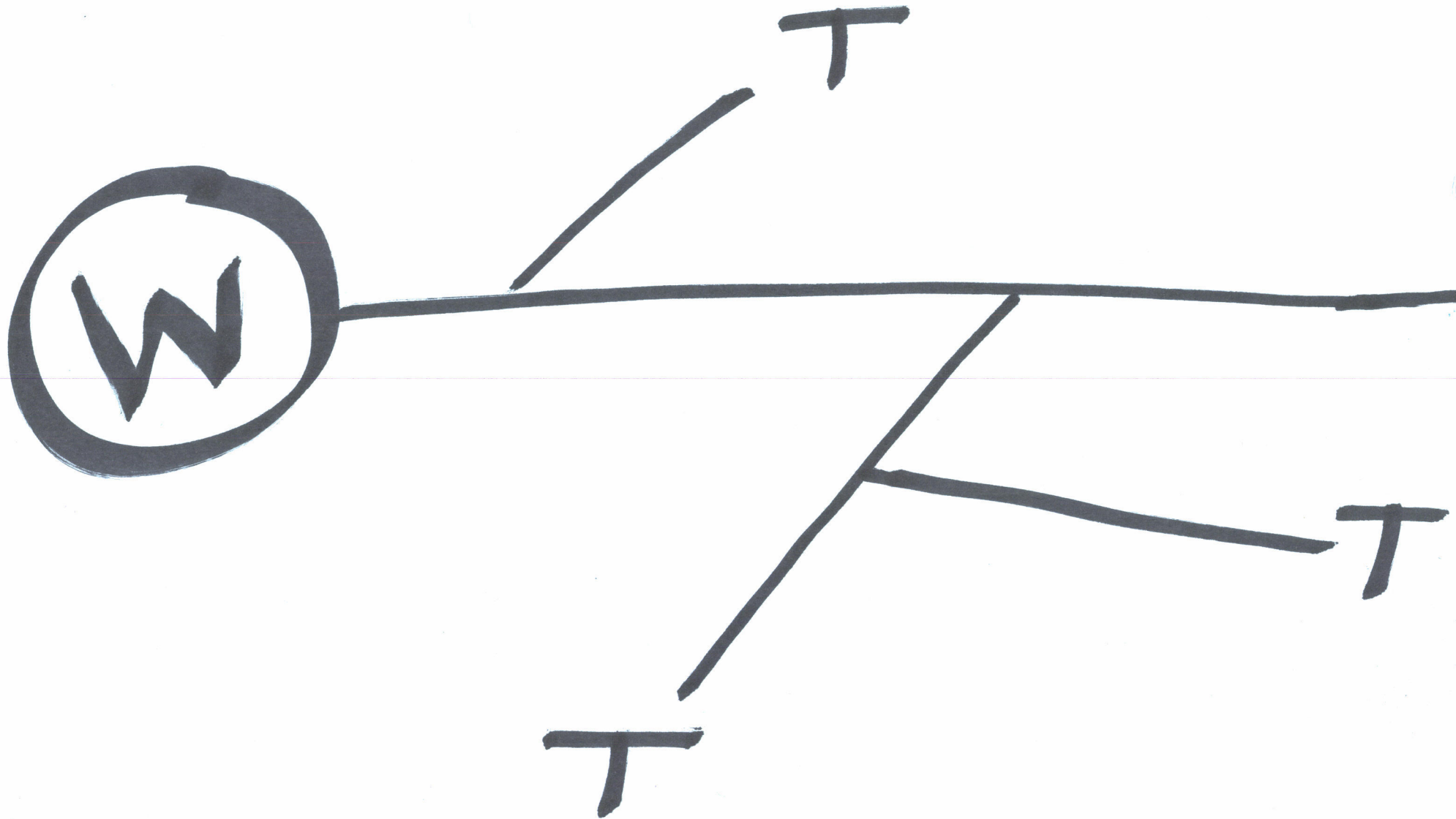
EXHIBIT 6 286

EXHIBIT	6	part 1
DATE	2.13.2019	
HB	286	

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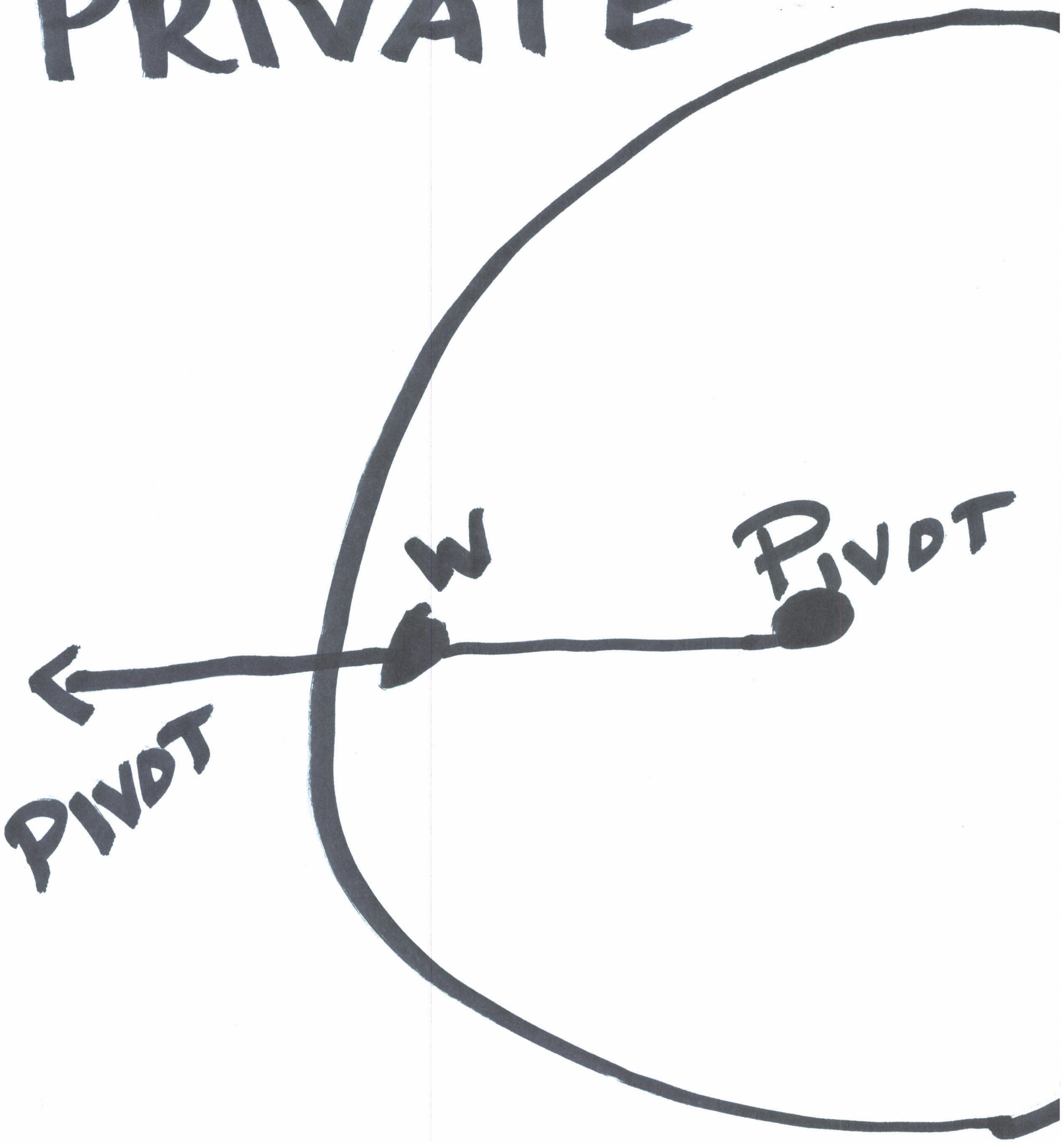
PRIVATE



STATE

EXHIBIT	7 (part 2)
DATE	2.13.2019
HB	286

PRIVATE



House Natural Resource Committee
Hearing on HB 286
Room 172
February 13, 2019

Mr. Chairman and Members of the Committee:

My name is Jim Hagenbarth and our family grazes livestock on private, state and BLM lands in southwestern Montana around Glen. We have been leasing state land in this area for 77 years and currently have 9 state leases where we harvest 1238 AUMS on 7144 acres of state land that is intermingled with private and BLM lands that make up an 18,610 acre grazing complex. This is in a 4-9 inch annual precipitation zone with very little live water. In 1970 this grazing area was divided up into 7 units with water being the limiting factor dictating season of use and class of livestock. In 1983 with the help of the NRCS we began to develop water via a pipelines and storage to make reasonable use feasible. In 2016 we finally finished this complex and are just beginning to harvest the AUMS we have been charged for throughout the last 77 years. We have installed over 81,000 feet of pipe which services 17 troughs, 6 storage tanks and has a system storage capacity of 65,000 gallons. This system has been serviced by two pumps in sumps using ground water that rises in a spring that straddles a private-property line. These sumps are located on deeded land and the 1983 water right is in our name. As we began to document the water use as we developed this system since 1983, the DNRC demanded that we put the State of Montana's name on this water right because the spring that supplies the ground water for the sumps rises on state and private land. Over the years we have purchased easements through state land for the entire mainline and have filed improvement applications that were improved for all other developments that go through state land. The DNRC did not pay one cent for any of the improvements we have made since 1983, yet they want their name on this water right. Over the years we have spent several hundred thousand dollars on this system so we could adequately use this range, including the state AUMs we have been charged for. Because of the algae in this spring we were losing our pumps every couple of years. We have recently added two additional points of diversion using wells rather than sumps to service the system. These wells are on our deeded land. This improvement cost us about \$60,000 dollars over a three year period to complete, \$7200 of which went to consultants and water lawyers dealing with the DNRC. This system has been developed to the point that it only uses 20 gallons per minute and can water up to 2250 head of cattle. Without this water system and grazing unit development, the dry nature of the area would make it practically useless. State lessees greatest contribution to the citizens of the state of Montana is the appreciation of value of the state land that is under their stewardship and management. One has to remember that the forage we harvest off state lands is on open space. In Montana it has been costing us over \$14 per AUM to provide and maintain the infrastructure necessary to responsibly harvest the forage from the grazing lands we manage. This cost is before an animal sets foot on it. Lessees contribute much more to the responsible management of state grazing land than the general

public recognizes. They are irreplaceable. The dialogue above is an attempt to demonstrate how much lessees really contribute.

HB 286 is an attempt by the author to recognize the value that state land lessees contribute to the school trust lands that they manage. It provides a mechanism where water from private sources can be temporarily used for stock water on state lands and is a function of the lessees' contribution and should not be subject to the onerous and greedy actions of the DNRC. The fact that water from private land can be temporarily used on state land without the state perfecting ownership of the source has clearly been settled by the Montana Water Court in Case No. 43A-A. The fact that the State of Montana has been bullying lessees into putting the State's name on private water sources is unacceptable under current legal precedence and needs to be put in law to stop this illegal and onerous action by the state. Our family supports HB 286. It can be very difficult and expensive to work with the state on these kinds of matters and this bill gives us guidance and relief. This bill has our full support.

Sincerely,

Jim Hagenbarth
PO Box 1128
Dillon, MT 59725
hagenbarthj@msn.com

66th LEGISLATURE 2019 SESSION

Additional Documents

Business Page

Proxies

Roll Call

Witness Statements

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example@ petitions,
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BUSINESS REPORT
MONTANA HOUSE OF REPRESENTATIVES
66th LEGISLATURE - REGULAR SESSION
HOUSE NATURAL RESOURCES COMMITTEE

Date: Wednesday, February 13, 2019
Place: Capitol

Time: 3:00 PM
Room: 172

BILLS and RESOLUTIONS HEARD:

HB 286 - Review water right laws related to state water claims - Rep. Alan Redfield

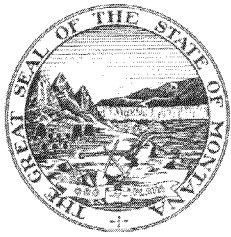
HB 383 - Extend deadline for appeal of streambed permit - Rep. Kerry White

EXECUTIVE ACTION TAKEN:

Comments:



REP. Kerry White, Chair



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

NATURAL RESOURCES COMMITTEE

ROLL CALL

DATE: 13 FEBRUARY 2019

NAME	PRESENT	ABSENT/EXCUSED
REP. MANZELLA, VICE CHAIR		✓
REP. CURDY, VICE CHAIR	✗	
REP. BOB BROWN	✗	
REP. ZACH BROWN		✓
REP. FARRIS-OLSEN	✗	
REP. FITZGERALD	✗	
REP. GUNDERSON	✓	
REP. KERR-CARPENTER	✗	
REP. CASEY KNUDSEN		✓
REP. RHONDA KNUDSEN		✗
REP. MARLER	✓	
REP. MORTENSEN	✗	
REP. NOLAND	✗	
REP. WEATHERWAX	✗	
REP. WHITE, CHAIR	✗	

15 MEMBERS



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

VISITOR REGISTER NATURAL RESOURCES COMMITTEE

DATE 13 FEBRUARY 2019

BILL NO: HB 286

SPONSOR(S): REP. ALAN REDFIELD

SHORT TITLE: REVIEW WATER RIGHT LAWS RELATED TO STATE WATER CLAIMS

Please leave prepared testimony with the clerk.

Witness Statement forms are available if you care to submit written testimony.

PLEASE PRINT

PLEASE PRINT

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PLEASE PRINT

Name	Representing	Support	Oppose	Informt'l
<i>Susan Lake</i>	<i>Self</i>	<i>X</i>		
<i>Jack Lake</i>	<i>Self</i>	<i>X</i>		
<i>Krista Lee Evans</i>	<i>SRWRC / AGAI</i>	<i>X</i>	<i>X</i>	
<i>Liv Stavick</i>	<i>MT Farm Bureau</i>	<i>X</i>		
<i>Mike Murphy</i>	<i>MWRA</i>	<i>X</i>		
<i>Wendy Zeller</i>	<i>DNRC</i>			<i>X</i>
<i>Mark Kesteven</i>	<i>DNRC</i>			<i>X</i>
<i>Bill Schenk</i>	<i>DFWP</i>			<i>X</i>
<i>Brian Braendelt</i>	<i>DNRC</i>		<i>X</i>	
<i>Abigail St. Lawrence</i>	<i>RMSGA</i>		<i>X</i>	
<i>Jan Lange</i>	<i>DNRC</i>		<i>X</i>	
<i>Jay Bodner</i>	<i>MSG / MCW</i>	<i>X</i>		
<i>Cindy Palmer</i>	<i>MT Farmers Union</i>	<i>X</i>		
<i>Ronda Wieggen</i>	<i>MT Water Well Drillers</i>	<i>X</i>		
<i>Colleen Cogle</i>	<i>Self</i>	<i>X</i>		



VISITOR REGISTER
NATURAL RESOURCES
COMMITTEE

BILL NO: HB 383

SHORT TITLE: EXTEND DEADLINE FOR APPEAL OF STREAMBED PERMIT

Witness Statement forms are available if you care to submit written testimony.

PLEASE PRINT

S:\2019 House Session\Committee Staff\Clerks\Natural Resources\Visitors Register.docx

February 6, 2019

Mr. Alan Redfield
Montana Legislative Committee on
Water Rights

Dear Mr. Redfield,

Thank you for this opportunity to address my grievances with the DNRC regarding their attempt to usurp recorded water rights on our J7 Ranch located northeast of Melville, Montana. Unfortunately, previous, unalterable plans prevent my attending your hearing on February 13th, so this letter must suffice.

Located on J7 Ranch and land-locked by our deeded land are approximately 960 acres of State Lease land. In early Fall of 2017 I received a "Notice Of Objection And Request For Hearing" from the Montana Water court in reference to the water right for one of our springs. It was dated September 11th, quite an appropriate date for a surprise attack. It stated "Pettibone applies. Ownership of this claim should be transferred to MSBLC/TLMD as its POU is on State land". Further investigation into the matter led me to understand that the State was claiming ownership of a spring located on deeded land with an enforceable water right dated December 27, 1963. This is an undeveloped spring with marginal flow that sometimes, during very wet years, provides a small amount of water that runs across the nearby fenceline onto the adjoining State section. To prevent an unnecessary conflict, I checked the exact location of the spring with a GPS device to make sure it was on deeded ground. Not only was the spring safely within the deeded land boundary, but so was the State Land fenceline. I spoke to the Water Master in Lewistown and was told that he had recently been inundated with similar claims and was not yet

“up to speed on what was going on”. This particular spring is fairly inconsequential in the overall management plan of the ranch, however, the arbitrary taking of this water right was still unacceptable, so we hired an extremely competent and respected water law attorney. I also spoke with Errol Rice, executive vice-president of the Montana Stockgrowers Association at that time, and later with John Youngberg of the Montana Farm Bureau. Both told me of a large scale attempt by the DNRC to obtain the water rights of other ranchers in the state.

During this period, we received a much more serious and potentially damaging threat to our ranching operation. We were sent an “Acknowledgement Of Water Right Ownership Update” dated December 18, 2017 for a well we had drilled with an Enforceable Priority Date of February 9, 2012. On this document, the Montana State Board of Land Commissioners/Trust Land Management Division was named as a co-owner of this well water right.

The ranch had historically counted on developed and undeveloped springs to provide water for livestock use, an undependable source at best, especially during times of drought. When we purchased the ranch in 2006, our management plan included a pipeline system to provide dependable water availability for a more uniform and sustainable grazing program. Over the next few years we spent many thousands of dollars drilling unproductive wells until we were able to find one capable of producing enough water to supply the system. It is located on deeded land one and a half miles from the State Land. Once that was finally accomplished, we spent many more thousands of dollars installing the system. Part of this water system included a half mile pipeline to a stock tank in the center of the State Lease section, a great improvement over the existing weak spring in the far corner of the pasture. The pasture was then ready for much more productive, sustainably even grazing. Oddly enough, not once during that period did we ever hear from our future partners in that well offering to partner in our extensive expenditures.

Persons at the DNRC informed our attorney that one possible way to remove their claims from our water rights would be to remove the “points of use” from the State Land. It is our understanding that it is the mission of the DNRC concerning the State Lands to optimize the income from those lands for the School Trust Fund. If all the livestock waters originating on deeded ground with points of use on State Lands were removed, the reduction in practical livestock carrying capacities would be monumental and the proportional reduction in the lease fee amounts would mean a significant loss to the Fund.

We believe that the addition of the State Board of Land Commissioners as co-owners of our well water right should be regarded as a “Government Taking” and a clear violation of the Fifth Amendment of the US Constitution. Water rights are defined as private property and there was no “due process” nor any “compensation” involved in the reclassification. It has also been discovered through extensive research by our attorney that the Pettibone Decision by the Montana Supreme Court does not apply to either of our water right issues.

The extremely large number of objections filed with the Water Court has already cost us and many other ranchers thousands of dollars in initial legal expenses. Should these cases go to court, the costs could be overwhelming for many of the ranchers and a very sizeable and unnecessary expense for the taxpayers of Montana.

It is our hope that the State Legislature will enact a law that will retroactively prevent this type of action taken by the DNRC. It would eliminate costly legal battles in the near term and hopefully inhibit this type of behavior in the future.

Thank you for your kind consideration in this matter and your continued efforts to represent the interests of the people in your district.

Mark Silverstein
Ranch Manager, J7 Ranch
Vice-President, J7 Ranch, Inc.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 66th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: Chair Kerry White, on February 22, 2019 at 3:00 PM, in Room 172
Capitol

ROLL CALL

Members Present:

Rep. Kerry White, Chair (R)
Rep. Willis Curdy, Vice Chair (D)
Rep. Theresa Manzella, Vice Chair (R)
Rep. Bob Brown (R)
Rep. Zach Brown (D)
Rep. Robert Farris-Olsen (D)
Rep. Ross H. Fitzgerald (R)
Rep. Steve Gunderson (R)
Rep. Emma Kerr-Carpenter (D)
Rep. Marilyn Marler (D)
Rep. Marvin Weatherwax (D)

Members Excused: Rep. Casey Knudsen (R)
Rep. Rhonda Knudsen (R)
Rep. Dale Mortensen (R)
Rep. Mark Noland (R)

Members Absent: None

Staff Present: Joe Kolman, Legislative Branch
Jacie Vonada, Committee Secretary

Audio Committees: These minutes are in outline form only. They provide a list of participants and a record of official action taken by the committee. The link to the audio recording of the meeting is available on the Legislative Branch website.

Committee Business Summary:

Hearing & Date Posted: HB 411, 2/13/2019; HJ 17, 2/14/2019; HB 451, 2/13/2019
Executive Action: HB 417, HB 286, HB 271, HB 441, HB 505

15:32:00 Chair White
15:33:40 Vice Chair Manzella assumed the Chair.

HEARING ON HB 451

Opening Statement by Sponsor:

15:33:51 Rep. Jim Keane (D), HD 73, opened the hearing on HB 451, Eliminate petroleum tank release compensation board.

Proponents' Testimony:

15:36:21 Shaun McGrath, Director, Department of Environmental Quality (DEQ)

EXHIBIT(nah38a01)

15:41:00 Earl Griffith, self

Opponents' Testimony:

15:47:38 Kary Tonjum, self

15:49:59 Greg Cross, self

15:51:29 Rick Roedocker, self

15:52:30 Brad Longcake, Montana Petroleum Marketers and Convenience Stores Association (MPMCSA)

EXHIBIT(nah38a02)

15:58:13 Rep. Rhonda Knudsen arrived to the meeting.

15:59:55 Daniel Kenney, self

16:04:02 Jerry Breen, self

Informational Testimony: None

Questions from Committee Members and Responses:

16:09:21 Rep. Gunderson

16:09:44 Director McGrath, DEQ

16:09:58 Rep. Gunderson

16:10:09 Director McGrath, DEQ

16:10:43 Rep. Kerr-Carpenter

16:11:38 Director McGrath, DEQ

16:11:54 Rep. Zach Brown

16:12:09 Rep. Keane

16:14:22 Rep. Fitzgerald

16:15:23 Rep. Keane

16:16:42 Rep. Fitzgerald

16:17:08 Rep. Keane

16:18:02 Vice Chair Manzella

16:18:21 Joe Kolman, Legislative Services Division (LSD)

16:18:30 Vice Chair Manzella

16:18:43 Rep. Fitzgerald

16:19:18 Mr. Kenney

16:19:25 Rep. Fitzgerald

16:20:01 Mr. Kenney

16:21:04 Rep. Fitzgerald
 16:21:51 Mr. Longcake, MPMCSA
 16:22:21 Rep. Fitzgerald
 16:22:35 Mr. Cross
 16:23:49 Vice Chair Manzella
 16:24:10 Jenny Chambers, Department of Environmental Quality (DEQ)
 16:27:05 Terry Wadsworth, self
 16:27:27 Rep. Kerr-Carpenter
 16:28:06 Rep. Keane
 16:28:23 Ms. Chambers, DEQ
 16:28:32 Rep. Kerr-Carpenter
 16:28:53 Ms. Chambers, DEQ
 16:29:54 Chair White
 16:30:21 Mr. Wadsworth, self
 16:31:05 Rep. Gunderson
 16:31:46 Ms. Chambers, DEQ
 16:32:06 Chair White
 16:32:25 Director McGrath, DEQ
 16:32:54 Vice Chair Manzella
 16:33:36 Mr. Longcake, MPMCSA
 16:36:07 Vice Chair Curdy
 16:36:25 Mr. Longcake, MPMCSA
 16:36:29 Vice Chair Curdy
 16:36:46 Mr. Longcake, MPMCSA
 16:37:07 Vice Chair Curdy
 16:37:27 Ms. Chambers, DEQ
 16:39:04 Rep. Gunderson
 16:39:25 Joe Kolman, LSD
 16:39:41 Rep. Gunderson
 16:39:59 Rep. Kerr Carpenter
 16:40:21 Rep. Keane
 16:41:57 Mr. Longcake, MPMCSA

[EXHIBIT\(nah38a03\)](#)

Closing by Sponsor:

16:42:33 Rep. Keane

16:46:55 Rep. White assumed the Chair.

HEARING ON HB 411

Opening Statement by Sponsor:

16:47:37 Rep. Willis Curdy (D), HD 98, opened the hearing on HB 411, Revise laws related to AIS expenditures and funding.

[EXHIBIT\(nah38a04\)](#)

[EXHIBIT\(nah38a05\)](#)

[EXHIBIT\(nah38a06\)](#)

Proponents' Testimony:

17:06:10 Martha Williams, Director, Fish, Wildlife and Parks (FWP)

17:13:36 John Tubbs, Director, Department of Natural Resources and Conservation (DNRC)
 17:15:47 Doug Hardy, Montana Electric Cooperatives Associations (MECA)
 17:16:17 Lori Curtis, Upper Columbia Conservation Commission (UCCC)
 17:17:08 Bob Gilbert, self
 17:21:02 Cindy Palmer, Montana Farmers Union (MFU)
 17:22:02 Bryce Christaiens, Missoula County Weed District (MCWD)
 17:22:36 Dan McGowan, Montana Association of Conservation Districts (MACD)
 17:23:33 Steve Wanderwaas, self
 17:24:16 Clayton Elliott, Montana Trout Unlimited (MTU)
 17:25:44 Matt Leow, Montana Chapter of Back Country Hunters and Anglers
 17:26:55 Julian Adler, Montana Public Interest Research Group (MontPIRG)
 17:27:35 Amy Seaman, Montana Audubon
 17:28:56 Dennis Clairmont, Confederated Salish Kootenai Tribes (CSKT)

Opponents' Testimony:

17:30:13 Tom Ebzery, Avista

[EXHIBIT](#)(nah38a07)

17:36:10 Rep. Noland arrived to the meeting.

17:36:16 Jan Rouse, Northwestern Energy

Informational Testimony: None

Questions from Committee Members and Responses:

17:37:23 Chair White
 17:38:31 Director Williams, FWP
 17:39:21 Chair White
 17:40:28 Director Tubbs, DNRC
 17:41:16 Chair White
 17:41:39 Director Tubbs, DNRC
 17:41:47 Chair White
 17:41:54 Rep. Bob Brown
 17:42:33 Rep. Curdy
 17:42:55 Director Williams, FWP
 17:43:00 Rep. Bob Brown
 17:43:31 Director Williams, FWP
 17:44:59 Rep. Bob Brown
 17:45:17 Director Williams, FWP
 17:46:23 Rep. Bob Brown
 17:46:39 Chair White
 17:47:53 Rep. Curdy
 17:48:09 Chair White
 17:48:46 Rep. Curdy
 17:49:07 Dustin Temple, Fish, Wildlife and Parks (FWP)
 17:50:05 Chair White
 17:50:45 Ms. Rouse, Northwestern Energy
 17:50:55 Chair White
 17:51:49 Ms. Rouse, Northwestern Energy

17:52:07 Chair White
 17:52:14 Rep. Zach Brown
 17:52:37 Ms. Rouse, Northwestern Energy

Closing by Sponsor:

17:53:00 Rep. Curdy

17:56:37 Chair White

HEARING ON HJ 17

Opening Statement by Sponsor:

17:56:58 Rep. Willis Curdy (D), HD 98, opened the hearing on HJ 17, Joint resolution to congress asking to fund aquatic invasive species programs.

Proponents' Testimony:

18:00:57 Jan Rouse, Northwestern Energy
 18:01:25 Bryce Christiaens, Missoula County Weed District (MCWD)
 18:01:47 Steve Wanderaas, Missouri River Conservation Districts Council (MRCDC)
 18:02:10 Dennis Clairmont, Confederated Salish Kootenai Tribes (CSKT)
 18:02:34 Dan McGowan, Montana Association of Conservation Districts (MACD)
 18:02:57 Amy Seaman, Montana Audubon
 18:03:08 Clayton Elliott, Montana Trout Unlimited
 18:03:37 Julian Adler, Montana Public Interest Research Group (MontPIRG)
 18:03:53 Liv Stavick, Montana Farm Bureau Association (MFBA)
 18:04:21 Matt Leow, Montana Backcountry Hunters and Anglers
 18:04:44 Mike Murphy, Montana Water Resources Association (MWRA)
 18:05:11 Martha Williams, Director, Fish, Wildlife and Parks
 18:05:25 Ray Beck, Department of Natural Resources and Conservation (DNRC)

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

18:06:02 Rep. Farris-Olsen
 18:06:22 Ms. Rouse, Northwestern Energy

Closing by Sponsor:

18:06:54 Rep. Curdy

18:07:40 Chair White

18:08:15 Recessed

18:27:36 Reconvened

EXECUTIVE ACTION ON HB 271

18:28:26 **Motion:** Rep. Manzella moved that **HB 271 DO PASS.**

Discussion:

18:28:49 Rep. Gunderson

18:31:27 **Substitute Motion/Vote:** Rep. Gunderson made a substitute motion that **HB 271 BE TABLED**. Substitute Motion carried 9-6 by roll call vote with Rep. Z. Brown, Rep. Curdy, Rep. Farris-Olsen, Rep. Kerr-Carpenter, Rep. Marler and Rep. Weatherwax voting no. Rep. C. Knudsen and Rep. Mortensen voted by proxy.

EXECUTIVE ACTION ON HB 286

18:32:46 **Motion:** Rep. Manzella moved that **HB 286 DO PASS.**

18:33:15 **Motion:** Rep. Manzella moved that **HB 286 BE AMENDED.**

[EXHIBIT](#)(nah38a08)

Discussion:

18:33:38 Joe Kolman, Legislative Services Division (LSD)

18:39:25 Chair White

18:39:42 Rep. Farris-Olsen

18:40:26 Joe Kolman, LSD

18:40:55 Rep. Zach Brown

18:41:11 Joe Kolman, LSD

18:41:21 **Vote:** Motion carried 14-1 by voice vote with Rep. Farris-Olsen voting no. Rep. C. Knudsen and Rep. Mortensen voted by proxy.

18:42:09 **Motion:** Rep. Manzella moved that **HB 286 DO PASS AS AMENDED.**

Discussion:

18:42:27 Rep. Curdy

18:43:14 Rep. Bob Brown

18:44:37 Rep. Farris-Olsen

18:45:54 Rep. Zach Brown

18:47:43 Chair White

18:49:13 Rep. Noland

18:50:14 Rep. Zach Brown

18:50:25 Rep. Noland

18:50:27 Chair White

18:50:33 **Vote:** Motion carried 13-2 by roll call vote with Rep. Curdy and Rep. Farris-Olsen voting no. Rep. C. Knudsen and Rep. Mortensen voted by proxy.

EXECUTIVE ACTION ON HB 417

18:52:00 **Motion:** Rep. Weatherwax moved that **HB 417 DO PASS.**

Discussion:

18:52:17 Rep. Weatherwax
18:54:12 Rep. Farris-Olsen
18:55:10 Rep. Weatherwax
18:56:32 Chair White
18:59:19 Rep. Kerr-Carpenter
19:00:21 Chair White
19:01:45 Rep. Farris-Olsen
19:02:47 Chair White
19:03:37 Rep. Weatherwax
19:04:17 Rep. Gunderson
19:06:21 Rep. Marler

19:06:34 **Vote:** Motion failed 6-9 by roll call vote with Rep. Z. Brown, Rep. Curdy, Rep. Farris-Olsen, Rep. Kerr-Carpenter, Rep. Marler and Rep. Weatherwax voting aye. Rep. C. Knudsen and Rep. Mortensen voted by proxy.

19:07:46 **Motion/Vote:** Rep. Manzella moved that **HB 417 BE TABLED.** Motion carried unanimously by voice vote.

EXECUTIVE ACTION ON HB 441

19:08:02 **Motion:** Rep. Manzella moved that **HB 441 DO PASS.**

Discussion:

19:08:40 Rep. Zach Brown
19:09:38 Chair White

19:09:59 **Vote:** Motion carried 13-2 by voice vote with Rep. Farris-Olsen and Rep. Kerr-Carpenter voting no. Rep. C. Knudsen and Rep. Mortensen voted by proxy.

EXECUTIVE ACTION ON HB 505

19:10:43 **Motion/Vote:** Rep. Manzella moved that **HB 505 DO PASS.** Motion carried 13-2 by voice vote with Rep. C. Knudsen and Rep. Noland voting no. Rep. C. Knudsen and Rep. Mortensen voted by proxy.

ADJOURNMENT

Adjournment: 19:11:52

Jacie Vonada, Secretary

jv

Additional Documents:

EXHIBIT([nah38aad.pdf](#))

Amendments to House Bill No. 286
1st Reading Copy

Requested by Representative Alan Redfield

For the House Natural Resources Committee

Prepared by Joe Kolman
February 22, 2019 (1:48pm)

1. Title, line 8 through line 11.

Strike: "CREATING" on line 8 through "DATES" on line 11

Insert: "AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A
RETROACTIVE APPLICABILITY DATE"

2. Page 1, line 17.

Following: "stock tanks"

Strike: "is a benefit" through the second "state"

Insert: "generates revenue to the state through increased
revenue"

3. Page 1, line 23.

Following: "diverted"

Strike: ", "

Insert: "and"

Following: "developed"

Strike: ", and perfected"

4. Page 1, line 25.

Following: line 24

Insert: "WHEREAS, the state of Montana incorrectly expanded the
scope of Department of State Lands v. Pettibone to include
all trusts, not just school trust lands; and

WHEREAS, the state of Montana incorrectly expanded the scope
of Department of State Lands v. Pettibone to assert ownership
over water rights that were diverted and developed on private
land; and

WHEREAS, the state of Montana is violating 85-2-306, MCA, in
asserting ownership over a ground water development in which the
state does not have exclusive property rights in the ground water
development works; and"

5. Page 2, line 2 through page 6, line 7.

Strike: everything after the enacting clause

Insert: "NEW SECTION. Section 1. Temporary use of a water
right on state trust land -- restrictions on state ownership --
rescinding of noncompliant ownership interests required. (1) A
water right owner may put water from a well or developed spring
with ground water development works located on private land to
beneficial use on state trust land for the duration of a state

land lease the water right owner holds.

(2) The state may not obtain an ownership interest in a water right or the ground water development works of a water right that is diverted from a well or developed spring exclusively based on trustee obligations for state trust land unless:

(a) the ground water development works are located on state trust land;

(b) all or part of the place of use of the water right is located on state trust land;

(c) the state owns exclusive property rights in the ground water development works; and

(d) other statutory requirements are met.

(3) Except as provided in subsection (2), the state may only acquire ownership interests in a water right or ground water development works to satisfy trustee obligations for state trust land by exercising the right of eminent domain pursuant to Title 70, chapter 30.

(4) Before September 30, 2019, the state shall rescind any claim of ownership it asserted or acquired prior to [the effective date of this act] in a water right or ground water development works to satisfy trustee obligations for state trust land that do not meet the requirements of subsections (2) or (3).

(5) For the purposes of this section, "state trust land" has the meaning provided in 77-1-101."

Insert: "NEW SECTION. Section 2. {standard} Codification instruction. [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [section 1]."

Insert: "NEW SECTION. Section 3. {standard} Effective date. [This act] is effective on passage and approval."

Insert: "NEW SECTION. Section 4. {standard} Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to water from a well or developed spring with ground water development works developed prior to [the effective date of this act]."

- END -

66th LEGISLATURE 2019 SESSION

Additional Documents

Business Page

Proxies

Roll Call

Witness Statements

Standing Committee
Reports

Informational items

Visitor Registrations

Table Bills

Any Document or
material presented
after the meeting for
example@ petitions,
news clippings ectara.

Fiscal reports

Tabled Bills

Roll Call Votes

BUSINESS REPORT

MONTANA HOUSE OF REPRESENTATIVES 66th LEGISLATURE - REGULAR SESSION

HOUSE NATURAL RESOURCES COMMITTEE

Date: Friday, February 22, 2019
Place: Capitol

Time: 3:00 PM
Room: 172

BILLS and RESOLUTIONS HEARD:

HB 411 - Revise laws related to AIS expenditures and funding - Rep. Willis Curdy

HB 451 - Eliminate petroleum tank release compensation board - Rep. Jim Keane

HJ 17 - Joint resolution to congress asking to fund aquatic invasive species programs - Rep. Willis Curdy

EXECUTIVE ACTION TAKEN:

HB 271 TABLED

HB 286 DO PASS AS AMENDED

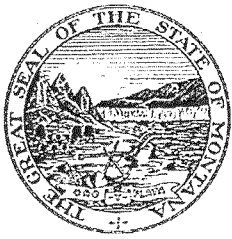
HB 417 TABLED

HB 441 DO PASS

HB 505 DO PASS

Comments:


REP. Kerry White, Chair



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

NATURAL RESOURCES COMMITTEE

ROLL CALL

DATE: 22 FEBRUARY 2019

NAME	PRESENT	ABSENT/EXCUSED
REP. MANZELLA, VICE CHAIR	X	
REP. CURDY, VICE CHAIR	X	
REP. BOB BROWN	X	
REP. ZACH BROWN	X	
REP. FARRIS-OLSEN	X	
REP. FITZGERALD	X	
REP. GUNDERSON	X	
REP. KERR-CARPENTER	X	
REP. CASEY KNUDSEN		X
REP. RHONDA KNUDSEN		X
REP. MARLER	X	
REP. MORTENSEN		X
REP. NOLAND		X
REP. WEATHERWAX	X	
REP. WHITE, CHAIR	X	

15 MEMBERS



HOUSE STANDING COMMITTEE REPORT

February 22, 2019

Page 1 of 3

Mr. Speaker:

We, your committee on **Natural Resources** recommend that **House Bill 286** (first reading copy - white) **do pass as amended**.

Signed: _____

Representative Kerry White, Chair

And, that such amendments read:

1. Title, line 8 through line 11.

Strike: "CREATING" on line 8 through "DATES" on line 11

Insert: "AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A
RETROACTIVE APPLICABILITY DATE"

2. Page 1, line 17.

Following: "stock tanks"

Strike: "is a benefit" through the second "state"

Insert: "generates revenue to the state through increased
revenue"

3. Page 1, line 23.

Following: "diverted"

Strike: ", "

Insert: "and"

Following: "developed"

Strike: ", and perfected"

4. Page 1, line 25.

Following: line 24

Insert: "WHEREAS, the state of Montana incorrectly expanded the
scope of Department of State Lands v. Pettibone to include
all trusts, not just school trust lands; and

WHEREAS, the state of Montana incorrectly expanded the scope
of Department of State Lands v. Pettibone to assert ownership
over water rights that were diverted and developed on private

Committee Vote:

Yes 13, No 2

Fiscal Note Required X

113
2.22

land; and

WHEREAS, the state of Montana is violating 85-2-306, MCA, in asserting ownership over a ground water development in which the state does not have exclusive property rights in the ground water development works; and"

5. Page 2, line 2 through page 6, line 7.

Strike: everything after the enacting clause

Insert: "NEW SECTION. **Section 1. Temporary use of a water right on state trust land -- restrictions on state ownership -- rescinding of noncompliant ownership interests required.** (1) A water right owner may put water from a well or developed spring with ground water development works located on private land to beneficial use on state trust land for the duration of a state land lease the water right owner holds.

(2) The state may not obtain an ownership interest in a water right or the ground water development works of a water right that is diverted from a well or developed spring exclusively based on trustee obligations for state trust land unless:

(a) the ground water development works are located on state trust land;

(b) all or part of the place of use of the water right is located on state trust land;

(c) the state owns exclusive property rights in the ground water development works; and

(d) other statutory requirements are met.

(3) Except as provided in subsection (2), the state may only acquire ownership interests in a water right or ground water development works to satisfy trustee obligations for state trust land by exercising the right of eminent domain pursuant to Title 70, chapter 30.

(4) Before September 30, 2019, the state shall rescind any claim of ownership it asserted or acquired prior to [the effective date of this act] in a water right or ground water development works to satisfy trustee obligations for state trust land that do not meet the requirements of subsections (2) or (3).

(5) For the purposes of this section, "state trust land" has the meaning provided in 77-1-101."

Insert: "NEW SECTION. **Section 2. Codification instruction.**

[Section 1] is intended to be codified as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [section 1]."

Insert: "NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval."

Insert: "NEW SECTION. **Section 4. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to water from a well or developed spring with ground water development works developed prior to [the effective date of this act]."

- END -



HOUSE STANDING COMMITTEE REPORT

February 22, 2019

Page 1 of 1

Mr. Speaker:

We, your committee on **Natural Resources** recommend that **House Bill 441** (first reading copy -
- white) **do pass**.

Signed: _____

Representative Kerry White, Chair

- END -

Committee Vote:

Yes 13, No 2

Fiscal Note Required X

HB0441001SC.hlc

NB
2.22



HOUSE STANDING COMMITTEE REPORT

February 22, 2019

Page 1 of 1

Mr. Speaker:

We, your committee on **Natural Resources** recommend that **House Bill 505** (first reading copy -
- white) **do pass**.

Signed: _____

Representative Kerry White, Chair

- END -

Committee Vote:

Yes 13, No 2

Fiscal Note Required ☐

HB0505001SC.hlc

NB
222

HOUSE Chief Clerk of the House COPY

BILL TABLED NOTICE

HOUSE NATURAL RESOURCES COMMITTEE

The HOUSE NATURAL RESOURCES COMMITTEE TABLED

HB 271 - Revise laws related to siting pipelines - Rep. Bridget Smith

HB 417 - Generally revise major facility siting act - Rep. Marvin Weatherwax

by motion, on Friday, February 22, 2019 (PLEASE USE THIS ACTION DATE IN LAWS BILL STATUS).

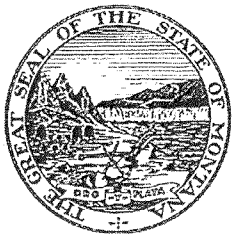

(For the Committee)


(For the Chief Clerk of the House)
7:59 / 2:22
(Time) (Date)

February 22, 2019 (7:34pm)

Jacie Vonada, Secretary

Phone: 444-4846



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

NATURAL RESOURCES COMMITTEE

ROLL CALL VOTE

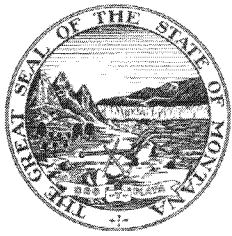
BILL NUMBER HB 271

DATE 22 FEB. 2019

MOTION SUBSTITUTE MOTION TO BE TABLED.

NAME	YES	NO	PROXY
REP. MANZELLA, VICE CHAIR	x		
REP. CURDY, VICE CHAIR		x	
REP. BOB BROWN	x		
REP. ZACH BROWN		x	
REP. FARRIS-OLSEN		x	
REP. FITZGERALD	x		
REP. GUNDERSON	x		
REP. KERR-CARPENTER		x	
REP. CASEY KNUDSEN	x		x
REP. RHONDA KNUDSEN	x		
REP. MARLER		x	
REP. MORTENSEN	x		x
REP. NOLAND	x		
REP. WEATHERWAX		x	
REP. WHITE, CHAIR	x		

15 MEMBERS



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

NATURAL RESOURCES COMMITTEE

ROLL CALL VOTE

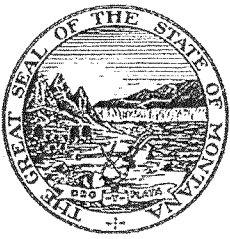
BILL NUMBER HB 286

DATE 22 FEBRUARY 2019

MOTION DO PASS AS AMENDED

NAME	YES	NO	PROXY
REP. MANZELLA, VICE CHAIR	x		
REP. CURDY, VICE CHAIR		x	
REP. BOB BROWN	x		
REP. ZACH BROWN	x		
REP. FARRIS-OLSEN		x	
REP. FITZGERALD	x		
REP. GUNDERSON	x		
REP. KERR-CARPENTER	x		
REP. CASEY KNUDSEN	x		x
REP. RHONDA KNUDSEN	x		
REP. MARLER	x		
REP. MORTENSEN	x		x
REP. NOLAND	x		
REP. WEATHERWAX	x		
REP. WHITE, CHAIR	x		

15 MEMBERS



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

NATURAL RESOURCES COMMITTEE

ROLL CALL VOTE

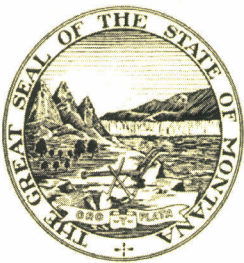
BILL NUMBER HB 417

DATE 22 FEB. 2019

MOTION DO PASS

NAME	YES	NO	PROXY
REP. MANZELLA, VICE CHAIR		X	
REP. CURDY, VICE CHAIR	X		
REP. BOB BROWN		X	
REP. ZACH BROWN	X		
REP. FARRIS-OLSEN	X		
REP. FITZGERALD		X	
REP. GUNDERSON		X	
REP. KERR-CARPENTER	X		
REP. CASEY KNUDSEN		X	X
REP. RHONDA KNUDSEN		X	
REP. MARLER	X		
REP. MORTENSEN		X	X
REP. NOLAND		X	
REP. WEATHERWAX	X		
REP. WHITE, CHAIR		X	

15 MEMBERS



DALE

The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the NATURAL RESOURCES Committee.

I desire to leave my proxy vote with Rep. MANZELLA.

BILL	AYE	NO
HB 271 TABLE	Y	Y
HB 286 AS AMENDED	Y	
HB 417		N
HB 441	Y	
HB 505	Y	
HB 0286 OL AJK	Y	

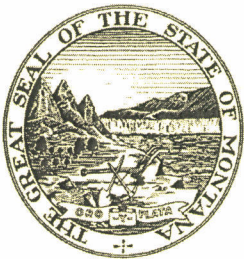
BILL	AYE	NO

I authorize my vote to be matched with that of Rep. MANZELLA
for any amendments proposed on this date.

Rep. [Signature]
(Signature)

Date 2-22-19

Casey Knudsen



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the N.R. Committee.

I desire to leave my proxy vote with Rep. Manzella.

BILL	AYE	NO
HB 271 TABLE	Y	NO
HB 286 AS AMENDED	Y	
HB 417		N
HB 441	Y	
HB 505		N
HB 028601. A.J.K.	Y	

BILL	AYE	NO

I authorize my vote to be matched with that of Rep. _____
for any amendments proposed on this date.

Rep. _____

(Signature)

Date

2.22.19



MONTANA HOUSE OF REPRESENTATIVES

DATE 22 FEBRUARY 2019

BILL NO: HB 451

SPONSOR(S): REP. JIM KEANE

SHORT TITLE: ELIMINATE PETROLEUM TANK RELEASE COMPENSATION BOARD

Please leave prepared testimony with the clerk.

Witness Statement forms are available if you care to submit written testimony.

PLEASE PRINT

PLEASE PRINT

S:\2019 House Session\Committee Staff\Clerks\Natural Resources\Visitors Register.docx



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

VISITOR REGISTER NATURAL RESOURCES COMMITTEE

DATE 22 FEBRUARY 2019

BILL NO: HB 411

SPONSOR(S): REP. WILLIS CURDY

SHORT TITLE: REVISE LAWS RELATED TO AIS EXPENDITURES AND FUNDING.

Please leave prepared testimony with the clerk.

Witness Statement forms are available if you care to submit written testimony.

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

Name	Representing	Support	Oppose	Inform't
Steve Wanders	McClone CP MRCDC CEMIST	✓		
Dan Mc Gowan	MACD	✓		
Steph Hester	DNRC-MISC			✓
DOUG HARDY	MECA	✓		
Byron Christians	Missoula County Weed	✓		
Julian Adler	MontPIRG	X		
Bob Gilbert	WU M	X		
Amy Seaman	MT Audubon	X		
Clayton Elliott	MT Trout Unlimited	X		
Tim Burton	MLCT	X		
Cindy Palmer	MT Farmers Union	X		
Tom Buckles	DNRC	X		
TOM EBZERY	Avista		X	
Jane Monahan-Kay	NHE		X	
Rena Claimont	CSKT	X		
Matt Leon	MT Backcountry Hunters + Anglers	X		



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

VISITOR REGISTER NATURAL RESOURCES COMMITTEE

DATE 22 FEBRUARY 2019

BILL NO: HJ 17

SPONSOR(S): REP. WILLIS CURDY

SHORT TITLE: JOINT RESOLUTION TO CONGRESS ASKING TO FUND AQUATIC
INVASIVE SPECIES PROGRAMS.

Please leave prepared testimony with the clerk.

Witness Statement forms are available if you care to submit written testimony.

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

Name	Representing	Support	Oppose	Inform't
Steve Wanderers	McClone CD MRCDC CEMIST	✓		
Dan Mc Gowan	MACD	✓		
Bryce Christensen	Missoula County Wood			
Julian Adler	MontPIRG	X		
Bob Gilbert	WUM	X		
Ami Seaman	MT Audubon	X		
Clayton Elliott	MT Trout Unlimited	X		
Liv Starick	MT Farm Bureau	X		
Cindy Palmer	MT Farmers Union	X		
Paul Nico	MT DEO			
Mark Jounissel	RTI			
Jay Green	Green Oil Co		X	
Tom Ebzery	Avista	X		
Dennis Clairmont	CSAT	X		
LORI CURTIS	Whitefish Lake Institute	X		
NATH. LEON	MT BHA	X		

Mike Murphy

MWR A

X

Kristi Lee Evans

SNWR/AGAI

X



February 13, 2019

Mr. White, Chairman

I AM WRITING TO ASK THAT YOU OPPOSE HB451. LC#0073-- HAVING DEQ TAKE OVER THE PETROLEUM BOARD.

OUR DEALINGS WITH THE DEQ AND THE PTRCB, OUR SITE #337 IS A PERFECT EXAMPLE OF BEING FORCED TO DO MORE WORK ON OUR SITE IN ORDER TO SPEND AND MAKE THE DEQ'S CONSULTANTS BUSY WHILE SUBMITTING CLAIMS TO THE BOARD AND WHAT IS \$17,500 TO THEM??? WELL TO US IT WAS HELL AND WE ARE STILL DEALING WITH IT AFTER 14YRS.

ALL THE CORRESPONDENCE, REPORTS, PLANS, PLEASE LOOK AT ALL QE HAVE BEEN FORCED TO DO ALL SHOW EXACTLY WHAT WE FEARED IN THE BEGINNING. WASTE MONEY WE DIDN'T HAVE TO CLEAN UP WHAT WAS COMING THROUGH UNDER OUR PROPERTY.

DEQ LIKES TO SPEND OWNERS MONIES--DEMANDING EXCESSIVE ACTIONS AND IN OUR CASE WITH KNOWLEDGE OF CONTAMINATION FROM THE FACILITY UP GRADIENT CAUSING CHEMISTRY UNDER OUR PROPERTY FIRING US TO "ADDRESS IT" BOARD LISTENED HEARD US OUT OFFERING HELP AND OTHERS AND HELPED US NAVIGATE THE SYSTEM.WITHOUT THE BOARD WE WOULD NOT OF BEEN HEARD. AND AFTERMTJE \$35,000.00 100% COMES OUT OF THE FUND FOR WHATEVER.....

HAD THE PETRO BOARD NOT INJECTED, AS YOU CAN SEE IN THE LINK THE BILLS KEPT COMING IN AFTER ALL INVOLVED WERE TOLD ABSOLUTLEY NO MORE

<http://svc.mt.gov/deq/dst/#/app/ptrcb/report/facilityid/3805047>

TOLD NO MORE UNTIL THE CONTAMINATION FROM THE UP GRADIENT PROPERTY IS ADDRESSED. WHICH WAS IUR VERY FIRST QUESTION TO DEQ OVER 10YRS AGO, AND OUR FIRST CONVERSATIONS WITH "OUR" CONSULTANT WHEN WE SAID WE HAVE NO MONEY TO DO ALL IF THAT AND HE ASKED US-"WELL HOW MUCH MONEY DO YOU HAVE?"

PTRCB KEEP TRACK OF ALL THE PROGRAMS FUNDS AND THE PROGRAM THAT HAS BECOME WHAT IT IS TODAY NEEDS TO STAY IN PLACE. THEY SAVE WE TAXPAYERS AND THE STATE MONEY AS WE HAVE WITNESSED THE EXCESSIVE SPENDING OF THE DEQ.

IT IS NOT BROKE SO PLEASE DON'T THINK IT NEEDS FIXED

OPPOSE HB 451 LC #0073

THANK YOU
RAYMOND RAGSDALE
4069352242

**ADDITIONAL
DOCUMENTS**

Mr. White, Chairman,

My name is Alyssa Ragsdale and I am a resident of Broadus Montana. The Board has done a great job of managing the fund and helping the citizens of Montana. Don't punish them for doing a good job. Tell the committee to oppose HB 451 LC0073. and tell the Board, thank you from the tax payers of Montana.

Alyssa Ragsdale
Broadus, MT 59317-0253

**ADDITIONAL
DOCUMENTS**

Mr. Chairman,

Please provide this email to the committee.

My name is Colton and I am a resident of Great Falls, Montana. I recommend that the members of the committee oppose House Bill 451 (LC0073). The board is doing the right thing for Montana. I know business owners that have received assistance from the board, it's staff, or the fund. They speak highly of this program and feel that it should remain as it is. Eliminating the board would be a HUGE MISTAKE for Montana.

Regards,

Colton Pointer

ADDITIONAL DOCUMENTS

Mr. Chairman:

Please distribute a copy of this letter to the members of the House Natural Resources committee. I have written this to recommend that the committee oppose House Bill 451 (LC0073) titled "Eliminate petroleum tank release compensation board".

My name is Brett Wiensch, a resident of Helena Montana. I am an owner of the 1889 Coffee House located at 1800 Prospect Ave, Helena, MT 59601.

Our business happens to be located on the property of an old Sinclair fuel station that had several petroleum releases (Sinclair Retail 25009, Facility ID: 2502093). If the releases at this property had not been eligible to the Petroleum Tank Release Cleanup Fund, we would not have purchased the property nor had the opportunity to build a family and locally owned Helena business as well as update a very dilapidated corner on a busy street in our state capital. Due to the petroleum releases I have firsthand experience dealing with DEQ.

If it was not for the Petroleum Tank Release Compensation Board, I would not be able to own my family business. The DEQ and the City of Helena have been very confusing to work with. The Board, through its staff, have assisted my business in obtaining the necessary information to get city approval. They spoke in terms that we could understand and ensured that we understood what was happening and why. The Board's attention to detail and care for finances saved over \$100,000 from our fund allotment. In addition, and more importantly, the Board, through its independent staff, has assisted my business with keeping the DEQ and the environmental consultants in check. It appears to me, having had to deal with DEQ for the last few years, that the DEQ helps ENRICH the consultants. The Board's staff has been instrumental in keeping the consultant and the DEQ from wasting public funds.

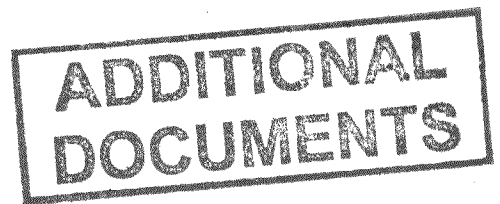
This Board has been instrumental in hiring staff that is competent enough to keep DEQ and the consultants from proposing ridiculous cleanup activities. This State Agency Board can actually assist the property owners with cleanup challenges and assist the citizens of Montana in properly spending their tax dollars. If not for the Board's passion and knowledge we would have spent over \$100,000 of tax payer's money on suggested work from our consultant and the DEQ.

Don't eliminate this board! They are what is keeping this program working properly for Montana. They are honest and sincere. Oppose House Bill 451 (LC0073).

Sincerely,



Brett Wiensch
Owner 1889 Coffee House
1800 Prospect Ave
Helena, MT 59601



Alyson Ragsdale

P.O. Box 253

Broadus, MT 59317-0253

February 13, 2019

Mr. Kerry White

Chairman

House Natural Resources

PO Box 201706

Helena, MT 59620-1706

Dear Chairman White:

I have written this letter to oppose House Bill 451 (LC0073) titled "Eliminate petroleum tank release compensation board". I want the members of the committee to be provided a copy of this letter so that they can have information that will help defeat the bill.

I am a tax paying resident of Montana who resides in Broadus Montana. My husband and I are business owners of "The Corner" located in Broadus Montana which also pays taxes to the state. As a resident of this state, I, and my family, purchase fuel from which a fee is collected to support the fund that this board manages.

The Board has done an excellent of managing this fund, assisting the citizens of this state, and keeping the Department of Environmental Quality in line. If this fund is put under the control of the DEQ they WILL MISUSE IT and they will become a DICTATOR with ALL THE POWER.

As a business owner I had firsthand experience with dealing with DEQ's dictatorship and their cozy relationship with the consultants. Our business happened to be located at an old Texaco station that was across the street from an active Cenex fuel station. The Cenex had a release at their facility. While they were investigating the area, they installed borings and wells adjacent to our property and then blamed the contamination on our business.

My husband and I FOUGHT the DEQ. We told them the contamination was not from our property but they would not listen. They had found contamination in our right-of-way and blamed it on us. We told them that the soils they had sampled were placed there by MDT during the recent highway re-construction project. MDT had dug up the black stinky dirt from the right-of-way by the CENEX one day and then had placed it all over the place, including just outside our front door. We had photographs and eye witnesses, but DEQ would still not listen to us. We asked DEQ to require all the wells in the area to be sampled together so that a complete picture of the contamination could be made and we could show them where all the contamination was coming from. They said they would, but they never did.

We asked the consultant, who was working for the Cenex to sample our wells along with the Cenex wells. At first she said she would, but, when we talked to her while she was sampling the Cenex wells, she stated she would only sample our wells if we would sign an agreement not to sue Cenex. If you don't believe all of this, give me the opportunity to bring my boxes of documents to the committee, so I can personally show them this nightmare.

As you can see, Fighting DEQ became very stressful. We lost business opportunities, couldn't get house financing, maxed out our credit card, and even had to cash in my husband's retirement account, all because DEQ would not listen. The consultant(s) we hired didn't seem to work for us. They didn't pay any attention to us, they didn't do their own science, and they just walked happily alongside DEQ. This was so stressful that it was affecting my physical health and I had to seek medical assistance. The doctor diagnosed me with autoimmune disease brought on by stress. I'll be happy to provide the committee with that paperwork too.

I was at my wits end and I didn't know what we could do. I looked to see if there was someone else in state government that could help us. I reached out to the Petro-Board staff, these are state employees that were hired by the Board (not DEQ). The staff, by the way, that are hired by the Board that this legislative bill is trying to eliminate! These people actually listened, conducted their own **independent science** and concluded that what my husband and I were saying was consistent with the sampling results.

Since the Board, had a dog in the fight, because they manage the fund that helps pay the bill, they were interested in listening and wanted the funding to be spent right. That's what your laws require them to do and they are doing a damn good job of it!

Like I said, the Board has done an excellent job of managing this fund, assisting the citizens of this state, and helping to keep the DEQ in line. This board serves a valuable purpose to the citizens of Montana. The Board makes sure that the science is being done right and that the fund is being used to pay for the right things.

WE feel very very strongly the YOU, as legislators, should make sure that this Board stays independent from DEQ. Neither an employee of DEQ nor any contractor for DEQ should be on this Board.

Hell, if it wasn't for the Board and their staff, I'd likely be dead! The STRESSES, FEAR AND UNKNOWING from the mafia behavior shown and documented by the DEQ unbearable and scarring to this day.

The DEQ will likely say they can do this work without the Board; however, eliminating the board will remove the proper balance that is currently in place, which keeps DEQ (and the consultants) in check.

They will likely support the bill because eliminating this Board would provide the DEQ an opportunity to have full access to the money in the fund so they can cover up their mistakes and reimburse their buddies. That agency hasn't changed. The people we dealt with still work there and they all still have the same approach to business owners and contaminated sites.

Voting to pass this bill would be a DISSERVICE to the citizens of Montana. Do something right for me, my husband, our daughter and for Montana, OPPOSE this bill and thank the Board for their processional service.

Sincerely,

Alyson Ragsdale

ADDITIONAL DOCUMENTS

I understand that HB 451 provides for replacement of the Montana Petroleum Tank Release Compensation Board (the Board) with staff of the Montana Department of Environmental Equality, with regard to operation of the Montana Petroleum Tank Release Compensation Program (the Program).

I am not sufficiently acquainted with the factors responsible for the submission of HB 451 to this Committee for hearing to urge the Committee to recommend that this bill pass or not.

However, for the reasons stated below, I want to acquaint the Committee with my own experience with the Board, and how that experience relates to my concerns about HB 451.

From approximately late 2003 to late 2009, I was employed by the Montana Attorney General, and assigned to provide legal counsel to the Montana Petroleum Tank Release Compensation Board (the Board).

My duties generally fell into the following areas:

1. Provision of legal counsel at Board meetings,
2. Representation, and provision of legal counsel, to the Board in contested MAPA and court cases;
3. Provision of legal counsel to Board staff as requested.

In that work I became very familiar with the Tank Release Compensation Program, as well as DEQ's Underground Storage Tank Program.

At the time I began working for the Board, the legislative auditor had just completed a detailed audit and audit report regarding operation of the Program. My recollection is that the audit was prompted out of concerns that the Program was not being consistently administered in compliance with applicable statutes and rules.

Other concerns at that time were that the Program, despite its self-funding mechanism, was running in the red, and also that the Program had developed a considerable backlog of unresolved claims involving owners and operators around the state. The former problem eventually required the Board to take out large loans from the Board of Investments. I don't recall exactly, but the loan amounts were well into the 7-figure range.

After that audit was completed there followed a virtual turnaround respecting the operation of the Board. The backlog of MAPA cases was resolved, and new claims were dealt with in a timely fashion. The BOI loans were repaid and the Board resumed operations, in the black,

using the statutory fee provided for in Section 75-11-314, MCA to fund reimbursements to owner/operators.

More importantly, in my judgment, the Board operated scrupulously in accordance with the statutes, and the administrative rules, governing the Board and the Program. The consistent policy and practice of the Board, the Board's staff, and the Executive Director during the period I worked for the Board was to carefully investigate each claim brought before the Board for compensation, carefully determine the facts, and rigorously apply the law at the time the release was discovered to the facts of each claim.

Under the Board, the Program was operated after 2003 in accordance with the recommendations of the legislative auditor and the requirements of controlling statutes. Claims for reimbursement were decided in a timely manner, including contested cases, through strict application of controlling law to the facts of each case.

While I worked there the Program was being operated efficiently and properly under the auspices of the Board, and it was being operated in a fiscally prudent manner which fulfilled the singular purpose of the program: to serve as a mechanism for providing the financial assurance which every gas station owner/operator in Montana must have to operate in compliance with state and federal statutes.

With due respect, based on my experience, my recommendation to the Committee is that it approach the replacement of the Board with considerable caution, given the Board's admirable track record since the 2003 legislative audit. The old adage that comes to mind is "if it ain't broke, don't fix it."

Thank you for the opportunity to comment, and please provide a copy of this letter to each member of the Committee prior to the hearing.

Respectfully,

Paul D. Johnson

19 Big Dipper
Clancy, MT 59634

Winter address:
Box 432
Ajo, AZ 85321

MINUTES

MONTANA SENATE 66th LEGISLATURE - REGULAR SESSION COMMITTEE ON NATURAL RESOURCES

Call to Order: Chair Jeffrey W. Welborn, on March 18, 2019 at 3:03 PM, in Room 422 Capitol

ROLL CALL

Members Present:

Sen. Jeffrey W. Welborn, Chair (R)
Sen. JP Pomnichowski, Vice Chair (D)
Sen. Duane Ankney (R)
Sen. Dick Barrett (D)
Sen. Jill Cohenour (D)
Sen. Pat Flowers (D)
Sen. Bruce Gillespie (R)
Sen. Brian Hoven (R)
Sen. Tom Jacobson (D)

Members Excused: Sen. Tom Richmond, Vice Chair (R)
Sen. John Esp (R)
Sen. Scott Sales (R)

Members Absent: None

Staff Present: Jason Mohr, Legislative Branch
Mary Vandenbosch, Committee Secretary

Audio Committees: These minutes are in outline form only. They provide a list of participants and a record of official action taken by the committee. The link to the audio recording of the meeting is available on the Legislative Branch website.

Committee Business Summary:

Hearing & Date Posted: HB 286, 3/13/2019; HB 505, 3/13/2019

HEARING ON HB 505

Opening Statement by Sponsor:

15:03:55 Rep. Walt Sales (R), HD 69, opened the hearing on HB 505, Require notice to shared water conveyance facilities.

Proponents' Testimony:

15:09:53 Krista Lee Evans, Senior Water Rights Coalition; Association of Gallatin Agricultural Irrigators
 15:11:52 Liv Stavick, Montana Farm Bureau Federation
 15:12:18 Mike Murphy, Montana Water Resources Association
 15:12:51 Colin Cooney, Trout Unlimited
 15:13:09 Jay Bodner, Montana Stockgrowers Association

Opponents' Testimony: None

Informational Testimony:

15:14:01 Millie Heffner, Water Rights Bureau chief, Department of Natural Resources and Conservation (DNRC)

Questions from Committee Members and Responses:

15:14:19 Sen. Pomnichowski
 15:14:59 Rep. Sales
 15:16:26 Ms. Heffner, DNRC
 15:17:27 Sen. Pomnichowski
 15:18:09 Rep. Sales

Closing by Sponsor:

15:19:22 Rep. Sales

HEARING ON HB 286

Opening Statement by Sponsor:

15:20:33 Rep. Alan Redfield (R), HD 59, opened the hearing on HB 286, Revise water right laws related to state water claims.

Proponents' Testimony:

15:22:18 Krista Lee Evans, Senior Water Rights Coalition (SrWRC); Association of Gallatin Agricultural Irrigators (AGAI)

EXHIBIT(nas55a01)

15:32:06 Shelby DeMars, United Property Owners of Montana
 15:33:03 Mike Murphy, Montana Water Resources Association
 15:33:28 Sen. Jacobson entered the hearing.
 15:33:46 Liv Stavick, Montana Farm Bureau Federation
 15:35:10 Cliff Schutter
 15:37:46 Mark Silverstein, J7 Ranch

15:44:37 Jay Bodner, Montana Stockgrowers Association

[EXHIBIT](#)(nas55a02)

15:49:06 Colleen Coyle

15:53:52 Sid Schutter

Opponents' Testimony:

15:57:24 John Tubbs, director, Department of Natural Resources and Conservation
(DNRC)

16:03:59 Brian Bramblett, attorney, DNRC

Informational Testimony: None

Questions from Committee Members and Responses:

16:16:17 Sen. Cohenour
16:17:07 Mr. Bramblett, DNRC
16:18:21 Mr. Tubbs, DNRC
16:20:55 Sen. Cohenour
16:21:02 Mr. Tubbs
16:29:25 Sen. Hoven
16:30:09 Mr. Tubbs
16:31:59 Sen. Gillespie
16:32:40 Mr. Bramblett
16:33:07 Shawn Thomas, Trust Lands Division administrator, DNRC
16:37:28 Mr. Tubbs
16:39:19 Sen. Gillespie
16:39:53 Mr. Tubbs
16:42:30 Sen. Barrett
16:42:51 Mr. Tubbs
16:43:11 Sen. Barrett
16:43:32 Mr. Tubbs
16:43:58 Sen. Barrett
16:44:09 Rep. Redfield
16:44:15 Sen. Flowers
16:44:26 Sen. Pomnichowski
16:44:53 Mr. Tubbs
16:52:03 Sen. Cohenour
16:52:34 Ms. Evans, SrWRC; AGAI
16:53:06 Sen. Cohenour
16:53:19 Ms. Evans
16:54:54 Sen. Cohenour
16:55:08 Ms. Evans
16:55:21 Sen. Cohenour
16:55:45 Ms. Evans
16:56:40 Sen. Hoven
16:57:05 Mr. Tubbs
16:57:13 Sen. Ankney
16:57:57 Mr. Tubbs
16:59:19 Chairman Welborn
17:00:07 Mr. Tubbs

17:00:55 Chairman Welborn
17:01:42 Mr. Tubbs
17:01:51 Chairman Welborn
17:02:20 Mr. Tubbs

Closing by Sponsor:

17:06:24 Rep. Redfield
17:07:58 Chairman Welborn

ADJOURNMENT

Adjournment: 5:08 PM

Mary Vandebosch, Secretary

mv

Additional Documents:

EXHIBIT([nas55aad.pdf](#))

66th LEGISLATURE 2019 SESSION

Additional Documents

Business Page

Roll Call

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BUSINESS REPORT

**MONTANA SENATE
66th LEGISLATURE - REGULAR SESSION**

SENATE NATURAL RESOURCES COMMITTEE

Date: Monday, March 18, 2019

Place: Capitol

Time: 3:00 PM

Room: 422

BILLS and RESOLUTIONS HEARD:

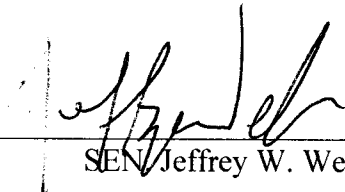
HB 286 - Revise water right laws related to state water claims - Rep. Alan Redfield (R)

HB 505 - Require notice to shared water conveyance facilities - Rep. Walt Sales (R)

EXECUTIVE ACTION TAKEN:

None

Comments:


SEN Jeffrey W. Welborn, Chair

MONTANA STATE SENATE
Roll Call
NATURAL RESOURCES COMMITTEE

DATE: 3-18-2019

<u>NAME</u>	<u>PRESENT</u>	<u>ABSENT/ EXCUSED</u>
VICE CHAIR TOM RICHMOND		✓
VICE CHAIR JP POMNICHOWSKI	✓	
SENATOR DUANE ANKNEY	✓	
SENATOR DICK BARRETT	✓	
SENATOR BRUCE GILLESPIE	✓	
SENATOR PAT FLOWERS	✓	
SENATOR JOHN ESP		✓
SENATOR TOM JACOBSON		✓
SENATOR BRIAN HOVEN	✓	
SENATOR JILL COHENOUR	✓	
SENATOR SCOTT SALES		✓
CHAIRMAN JEFFREY WELBORN	✓	

SENATE NATURAL RESOURCES COMMITTEE

Sponsor: Rep. Alan Redfield (R)

PLEASE PRINT

[illegible]

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

SENATE NATURAL RESOURCES

Exhibit No. 1Date 3-18-2019Bill No. HB 286

Montana Code Annotated 2017

THE CONSTITUTION OF THE STATE OF MONTANA

ARTICLE X. EDUCATION AND PUBLIC LANDS

Part X. EDUCATION AND PUBLIC LANDS

Public Land Trust, Disposition

Section 11. Public land trust, disposition. (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

(2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

Created by **LAWS**

Krista Lee Evans
3rWRC/AGAI
406-439-2215

MCA Contents / THE CONSTITUTION ... / ARTICLE X / Part X / Section 3 Public school...

Montana Code Annotated 2017

THE CONSTITUTION OF THE STATE OF MONTANA

ARTICLE X. EDUCATION AND PUBLIC LANDS

Part X. EDUCATION AND PUBLIC LANDS

Public School Fund Inviolate

Section 3. Public school fund inviolate. The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion.

Created by **LAWS** 

Montana Code Annotated 2017

THE CONSTITUTION OF THE STATE OF MONTANA

ARTICLE IX. ENVIRONMENT AND NATURAL RESOURCES

Part IX. ENVIRONMENT AND NATURAL RESOURCES

Water Rights

Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Created by **LAWS** 

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364

FILED

JUN 29 2000

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
SHIELDS RIVER BASIN (43A)

IN THE MATTER OF THE ADJUDICATION OF THE) CASE NO. 43A-A
EXISTING RIGHTS TO THE USE OF ALL THE)
WATER, BOTH SURFACE AND UNDERGROUND) 43A-W-042435-00
WITHIN THE SHIELDS RIVER DRAINAGE AREA)
INCLUDING ALL TRIBUTARIES OF THE)
SHIELDS RIVER, IN PARK, MEAGHER AND)
GALLATIN COUNTIES, MONTANA.)

CLAIMANT: Julie C. and Joseph D. Harper, Dennis J. and
L. Darlene Leahy, Richard D. & Gay W. Juhnke

ON MOTION OF THE WATER COURT

OBJECTOR: Montana Department of Natural Resources and Conservation (Trust Lands Division)

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND MEMORANDUM**

Procedural Background

On November 10, 1981, Delbert and Bernice Kunnemann ("Kunnemanns") filed Statement of Claim 43A-W-042435-00 with the Montana Department of Natural Resources and Conservation ("DNRC") for an existing water right to 154 miners inches of water (3.85 cfs) diverted from the Shields River in Section 32 of Township 1 North, Range 10 East, M.P.M., to irrigate 65 acres of land in the N1/2 of Section 16 of Township 1 South, Range 10 East, M.P.M. The Shields River Temporary Preliminary Decree was issued in 1988, decreeing the water right as claimed.

The claim was subsequently called in on motion of the Water Court to review the issues of acres irrigated, place of use and flow rate. On March 19, 1992, the Water Master issued a Report concluding that the historical pre-July 1, 1973 flow rate was 3.85 cfs for use on 35 acres of land in the W1/2 of Section 16, 30 acres of land in the N1/2 of Section 16, and 1.94 acres in the

RETURN TO CLAIMANT
BY RETURNED MAIL
APPLICANT

subsequently used on other place
does not become state property

Krista Lee Evans
srwrc/AGAI
406-439-2215

KUNNEMANN

SWNESW of Section 4, all in Township 1 South, Range 10 East, Park County.¹ An Order Adopting the Master's Report was filed on April 13, 1992.

On March 13, 1995, the Montana Department of State Lands ("DSL") filed a late objection to "ownership" of the claim, based on the Montana Supreme Court's decision in Department of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948 (1985). As the objection was filed nearly six years after expiration of the objection period, it was docketed to be heard after issuance of the Basin 43A Preliminary Decree.

In 1989, Dennis J. and L. Darlene Leahy ("Leahys" or "Claimants") acquired the land in the NE1/4 of Section 16. In 1995, they filed an Application to Change Place of Use with the DNRC seeking to remove that portion of the claim previously used on school trust land in the W1/2 of Section 16 and thereby use the entire claim on their private lands. On June 19, 1995, the DSL filed an Objection to the Application. On April 22, 1996, DSL's successor, Forestry and Trust Land Management Division, Department of Natural Resources and Conservation ("TLMD"), moved the Water Court for a judgment declaring the State of Montana to be the owner of that portion of the water right claim used on school trust land.

On August 2, 1996, the Court reopened the claim to resolve the issue of ownership. The claim was consolidated into Case 43A-A and, on May 27 and 28, 1997, came on for hearing before C. Bruce Loble, Chief Water Judge. The Leahys were present and represented by A. Suzanne Nellen, attorney at law. The TLMD was present and represented by Richard Bach, attorney at law. Evidence both documentary and testimonial was adduced, and counsel for the parties submitted proposed findings of fact and conclusions of law. Judicial notice was taken of the contents of the claim file.

Based on the evidence, and upon consideration of the respective arguments of counsel, the Court now makes its own:

FINDINGS OF FACT

1. This claim is based on a portion of a water right decreed to J. B. McNiven ("McNiven") in Henwood v. Hodson, Cause No. 2717, by the Montana Sixth Judicial District Court,

¹ The Master's Report concluded that Joseph D. and C. Julie Harper, successors in interest to 1.94 acres of Kunnemann land located in the SWNESW of Section 4, T1S, R10E, M.P.M., are entitled to .25 cfs of this claim for that place of use. The Harper portion of this claim is uncontested.

Park County, Montana, in 1911. (Agreed Facts 4, 6)

2. In 1893, Alexander McNiven and John McNiven posted and filed a Notice of Water Right, pursuant to section 1255, 5th Div. Comp. Stat. of 1887, for 600 inches of water diverted from a point on the Shields River "near the north line of Section 4," in Township 1 South, Range 10 East, Park County, for conveyance by "dam, ditch and flume" for beneficial use on the N1/2 of Section 9, Township 1 South, Range 10 East, Park County.

3. In the Henwood decree of 1911, the District Court decreed the water right noted in Finding of Fact 2 to John McNiven as follows:

[T]he defendant, John McNiven, is the owner of the following lands in Park County, Montana, to wit:

West Half of the South West quarter of Section Four (4), North East quarter of the South West quarter and the South East quarter of the North West quarter of Section Eight (8) and part of the West Half South of the River in Section Nine (9) all in Township One (1) South of Range Ten (10) East.

That the said defendant is the owner of a water right of 450 inches equivalent to a flow of 11 1/4 cubic feet per second of time, appropriated from the waters of Shields River, on the 14th day of August, 1893, which is appurtenant to said land, and that he has a right to divert the same from the said stream at all times when said water is actually needed for irrigating said land, or for other useful and beneficial purposes, provided that said water is not being necessarily used by some other party or parties to this action, whose right to the same is prior to that of the said defendant, as decreed herein.

[emphasis added] ("McNiven decreed water right") (Agreed Facts 3, 5; Joint Exhibit 10, Henwood v. Hodson, Cause No. 2717, issued by Montana Sixth Judicial District Court, Park County, on March 3, 1911; Claim File) The State of Montana was not named as a claimant in the lawsuit.

4. In 1904, John McNiven posted and filed another Notice of Water Right, pursuant to sections 1880 to 1902, Civil Code of 1895, for 100 inches of water diverted from a point on the Shields River "near the north line of Section 4, Township 1 South, Range 10 East, Park County," to be conveyed by "dam, ditch and flume" for beneficial use on the W1/2 of Section 16, Township 1 South, Range 10 East, Park County, this ditch "being an enlargement and continuation of the ditch now owned by the appropriator which is of record in Vol. 1, p. 256, Water Rights,

records of Park County, Montana." The place of use for this filed right was school trust land, which John McNiven began leasing from the State in 1907 or some time thereafter. This filed right was not adjudicated as part of the Shields River Decree in 1911, and no one, including the State of Montana, filed a claim in Montana's statewide general adjudication based on this right until the TLMD filed late Statement of Claim 43A-W-215510-00 with the DNRC in 1996. (Claimants' Exhibits 1, 17)

5. Section 16 is among those sections of public domain reserved in the 1864 Organic Act for "the purpose of being applied to schools," and granted in the 1889 Enabling Act to the State of Montana "for the support of common schools." (Joint Exhibit 3)

6. A field survey of all but the SE corner of Section 16 was completed in 1873, and Plat No. 349, with accompanying notes, was approved by the Office of the U.S. Surveyor General in the same year. Title to Section 16 therefore vested in the State of Montana upon its admission to the Union, even though the patent was not issued to the State until 1943. (Joint Exhibit 3; Judicial Notice of official records on file and of record in the Public Records of the United States Dept. of Interior, BLM, Billings, Montana)

7. On October 29, 1934, the State issued a patent for the NE1/4 of Section 16 to Grace David, who subsequently conveyed the same and the S1/2 of Section 9, "together with ... appurtenances," to Florence and Taylor McNiven. (Joint Exhibit 2) In 1963, Florence McNiven conveyed the NE1/4 of Section 16 (as well as the W1/2 of SW1/4, all of Section 8, and that portion of the N1/2 of Section 9 lying west of the middle of the present channel of Shields River, T1S, R10E, Park County, Montana) to Arnold and Louise Dinsdale, "together with the... tenements, hereditaments and appurtenances," which expressly included "water rights and water ditches, if any, thereto belonging." The Dinsdales also held the lease on school trust land located in the W1/2 of Section 16. (Agreed Fact 8; Joint Exhibits 4, 5, 14 (Letter of Daniel R. Dinsdale, November 18, 1991), and 19; Testimony of Daniel Dinsdale and Delbert Kunnemann)

8. Daniel Dinsdale, their son, stated by letter that prior to July 1, 1973, his father used 154 inches of the water right to irrigate 35 acres of State lease land and 30 acres of private land in the N1/2 of Section 16. He confirmed those statements by testimony and further testified that his father irrigated the leased land above and below Noel Creek out of the McNiven ditch; and his deeded land in Section 16 out of both the McNiven Ditch and the Grannis Ditch. (Agreed Fact 8;

Testimony of Daniel R. Dinsdale; Letter of Daniel R. Dinsdale, November 18, 1991) He testified that when water was short, the water was used on the upper ranch first, and Section 16 was irrigated only if there was enough water left to reach the land.

9. In 1969, the Dinsdales conveyed all their private land to the Kunnemanns, together with all "tenements, hereditaments and appurtenances." Daniel Dinsdale testified that his parents transferred both the private land and the school lease to the Kunnemanns, and that "to his knowledge," all the water rights were intended to transfer with the land. (Agreed Fact 9; Joint Exhibits 6, 20, 21; Testimony of Daniel R. Dinsdale and Delbert Kunnemann; Letter of Daniel R. Dinsdale, November 18, 1991)

10. In 1972, Delbert Kunnemann acquired his own State lease to the land in the W1/2 of Section 16. When water was short, he continued the practice of using the water on the upper ranch first and irrigating Section 16 only when there was enough water to reach the land. Between 1969 and 1988, Kunnemann divided and conveyed tracts of his ranch land and appurtenant water rights to other parties, but retained land in Section 9 and in the NE1/4 of Section 16, together with 154 inches of the water right. Kunnemann continued to use the water right on both his leased and deeded land. Like the Dinsdales, he irrigated the leased land out of the McNiven Ditch both above and below Noel Creek; and his private land adjacent to the leased land out of both the McNiven and Grannis Ditches.

11. On November 10, 1981, Kunnemanns filed a Statement of Claim for 154 inches of the original McNiven decreed water right, with a point of diversion off school trust land and the place of use as the N1/2 of Section 16, Township 1 South, Range 10 East, Park County. Kunnemann testified that his intent with respect to the water right was to "keep the water" for his deeded land, but to "permit" its use on the leased land for as long as he held the lease.

12. When he assigned the school lease to Harry and Alice Williams ("Williams"), Kunnemann did not transfer any portion of the water right to them, but told them they could continue to use his water right on the leased land. When the lease ended, Kunnemann's intent was to continue to use the entire 154 inch water right on his deeded land. In 1991, the Williams attempted to transfer the portion of the water right they used on the school trust land to the DSL. The DSL declined the offer and told the DNRC that the water right belonged to the lessee, because the point of diversion was off the State land. In 1991, the Williams filed an affidavit with the Water Court disclaiming any

ownership interest in the claim. (Agreed Facts 7, 13, 14; Joint Exhibits 12, 21, 25; State's Exhibit 15; Williams letter attached to Affidavit of Harry D. Williams, Sr. and Alice Williams, filed December 10, 1991, Claim and Case Files)

13. In 1989, the Kunnemanns conveyed their land in Section 9 and the NE1/4 of Section 16 to First Security Bank in lieu of foreclosure of a mortgage they had previously granted to the Federal Land Bank. This conveyance was together with "all tenements, hereditaments and appurtenances," and expressly included "all water rights and ditch rights upon or appurtenant to the real property." Kunnemann testified that his intent was to transfer all the water rights with the land. (Joint Exhibits 7, 8, 8b)

14. Shortly thereafter, the bank conveyed the land, "together with all water rights and rights in ditches..." to Rasmussen, who sold the same to the Leahys by contract for deed, dated December 27, 1989. Although the escrowed warranty deed is silent as to appurtenances, water rights, and ditch rights, the Agreement to Sell and Purchase promised that "Seller will transfer all water ... rights owned by and pertaining to said property to Buyer," In 1994, First Security Bank filed a transfer certificate to document their transfer of the water right to the Leahys, which was accepted and filed by the DNRC. Although the Leahys had previously filed a Water Right Transfer Certificate with respect to the transfer from Kunnemanns, it was rejected by the DNRC. As the Leahys' certificate was neither prepared nor signed by Kunnemanns, it does not represent their intent with respect to the water right transfer. (Agreed Fact 9; Letter from First Security Bank, Claimant's Exhibit 12; Claimants' Exhibit 28)

15. The State of Montana did not file an independent claim in Montana's statewide general adjudication effort for any water right used on the W1/2 of Section 16 until 1996, when it filed Statement of Claim 43A-W-215510-00 for 100 miners inches, with a priority date of 1904. During the temporary preliminary decree objection period for Basin 43A, and at the time of the 1992 Master's Report amending the decree, the policy of the DSL was to assert State interest only in water rights that were diverted on and used on State land and not to claim ownership of a water right with a point of diversion off school trust land. According to the TLMD and Tom Hughes, Water Rights Specialist for the TLMD, the TLMD did not amend its policy or begin claiming water rights put to beneficial use on State land regardless of point of diversion until after 1991. (Agreed Facts 1, 2, 10, 11, 12; Joint Exhibit 16; Claimants' Exhibit 1; *see also* Joint Exhibit 17; DNRC records and Case

File)

From the above Findings, the Court now makes the following:

CONCLUSIONS OF LAW

I

The Montana Water Court has exclusive jurisdiction to interpret and determine "existing water rights." §§ 3-7-224 and 3-7-501, MCA; State ex rel. Jones v. Fourth Judicial District, 283 Mont. 1, 6, 938 P.2d 1312 (1997); Baker Ditch Co. v. District Court, 251 Mont. 251, 255, 256, 824 P.2d 260 (1992); and Mildenberger v. Galbraith, 249 Mont. 161, 166, 815 P.2d 130 (1991).

II

Existing water rights were recognized and confirmed in the 1972 Constitution of the State of Montana at Article IX, Section 3. "'Existing right' or 'existing water right' means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." Section 85-2-102(8), MCA. *See generally* In Matter of Adjudication of Water Rights of Yellowstone River, 253 Mont. 167, 173, 174, 832 P.2d 1210 (1992); McDonald v. State, 220 Mont. 519, 525, 722 P.2d 598 (1986). The same constitutional guarantee prevents the State from affecting rights vested at the time the [1972] Constitution was adopted other than through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, Sec. 17, or the general police power, and without affording due process of law, Mont. Const. Art. I, sec. 17. Pettibone, 216 Mont. at 702; *See also* Yellowstone River, *supra*.

III

A claim of an existing water right filed in accordance with 85-2-221, MCA, constitutes *prima facie* proof of its content. § 85-2-227, MCA. The elements of a *prima facie* statement of claim may be overcome by a preponderance of the evidence contradicting and overcoming the claim. When that is accomplished, the burden of proving the claim shifts back to the claimant. *See* analysis of this issue in Memorandum Opinion of the Montana Water Court, Case No. 40G-2, March 11, 1997, which analysis the Court incorporates herein by reference. Therefore, when Kunnemanns filed their Statement of Claim in accordance with § 85-2-227, MCA, and asserted an ownership interest in the original McNiven decreed water right, their claim became *prima facie* proof of its contents, and the burden of contradicting and overcoming the contents of that claim lay

in the State of Montana. Section 85-2-227, MCA.

IV

The State's premise that "because this involves school trust land, the holding in Department of State Lands v. Pettibone ... is applicable," is incorrect. The holding in Pettibone applies only to water rights diverted or developed on and appurtenant to school trust land. Pettibone, 216 Mont. at 376. Therefore, the State may not presume that Kunnemann was acting on behalf of the State of Montana when he used part of his water right to irrigate school trust land, or that the water right necessarily became appurtenant to the school trust land and owned by the State of Montana. Pettibone, 216 Mont. at 372-373; Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 83, 290 P. 255 (1930). The water right used in this claim was diverted and developed off school trust land and was used on private land. Accordingly, the rules with respect to the ownership of appropriations made on and for the public domain or private land are more applicable to this case.

V

When J.B. McNiven, the Claimants' predecessor in interest, diverted water in 1893 from the Shields River on non-school trust land and conveyed it by "dam, ditch, and flume" to irrigate his private land in Sections 4, 8, and 9, Township 1 South, Range 10 East, Park County, Montana, he acquired a positive, certain, and vested property right, which was subsequently decreed in his name and appurtenant to his private land. Pettibone, 216 Mont. at 375. *See also* Yellowstone River, *supra*. Neither he, nor his successors in interest, may be divested of that property right except through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, Sec. 17, or the general police power, and without affording due process of law, Mont. Const. Art. I, sec. 17. Pettibone, 216 Mont. at 375.

VI

When the owners of this vested water right changed its place of beneficial use from time to time to other private land they owned, *e.g.* 30 acres in the NE1/4 of Section 16, the water right also became appurtenant to the new place of use, because there was no evidence of any intent to the contrary, and no other water users alleged or proved any injury as a result of these changes. §89-803, RCM (1947); Maclay v. Missoula Irrigation District, 90 Mont. 344, 353, 3 P.2d 286 (1931).

VII

When the owners of this vested water right temporarily changed its place of use from time to time to school trust land they leased in the W1/2 of Section 16, the water right was used in gross. No part of the water right permanently attached as an appurtenance to the school trust land owned by the State of Montana. There was no privity of title between the owners of the water right (McNiven and successors) and the owner of the school trust land (State). Any use of the water right on school trust land leased by the owners of the water right was intended to be temporary and with the owners' permission only. Title to the water right was intended to remain with the lessees and appurtenant to the private land on which it was beneficially used. See e.g. Maclay, 90 Mont. at 353-354; Yellowstone Valley, 88 Mont. at 82; St. Onge v. Blakeley, 76 Mont. 1, 18-19, 245 P. 532 (1926); and Smith v. Denniff, 24 Mont. 20, 27-28, 60 P. 398 (1900).

VIII

As there was no severance or reservation of the water right in the chain of title conveying the 30 acres in the NE1/4 of Section 16 by mesne conveyance to the Leahys, or other evidence of intent to sever the water right from the land, all but the Harpers' portion of the right ultimately transferred to the Leahys by deed as an appurtenance to the land. §85-2-403(1), MCA; Yellowstone Valley, 88 Mont. at 84.

IX

There was no intentional or voluntary waiver of known rights by the Leahys or their predecessors at either the time of the original temporary preliminary decree or subsequent amendment by the Water Court, and therefore, the Court denies the State's claim of waiver. Estate of Pelzman, 261 Mont. 461, 863 P.2d 1019 (1993). As the State failed to establish all the elements of judicial estoppel with respect to the Leahys' asserted positions in this case, the Court also denies the State's claim of judicial estoppel. Caekaert v. State Fund, 268 Mont. 105, 885 P.2d 495 (1994); Fiedler v. Fiedler, 266 Mont. 133, 879 P.2d 675 (1994).

X

Dennis J. and L. Darlene Leahy, and Julie C. and Joseph D. Harper, are the current owners of Claim No. 43A-W-042435-00.

XI

Having decreed ownership of this claim in the Leahys and Harpers, the Court declines

to address the Leahys' alternative claims of Waiver and Estoppel.

MEMORANDUM

The Legal Issue

The State of Montana filed this action to obtain a declaratory judgment adjudicating the State of Montana to be the owner of that part of Claim No. 43A-W-042435-00 historically used on school trust land in the W1/2 of Section 16. The TLMD asserts three theories in support of its motion. The first theory is based on the holding and rationale of the Montana Supreme Court in Department of State Lands v. Pettibone. The second and third theories are based on waiver and judicial estoppel. The Leahys (successors to the Kunnemanns) contest the State's motion and theories by distinguishing the Pettibone decision and basing their ownership on the doctrine of appurtenancy as interpreted and applied by the Montana Supreme Court in those cases involving water rights diverted and used on the public domain.² In addition, the Leahys contend that by failing to timely file a claim to the water, or even timely filing an objection to the claim, the State of Montana has now waived its right to do so.

The legal issue before the Court, therefore, is as follows:

Who is the owner of a water right diverted on the public domain or private land and decreed by a district court to be appurtenant to private land, when part of that water right is subsequently used for beneficial purposes on State school trust land?

Discussion

Department of State Lands v. Pettibone

The TLMD argues that when Kunnemanns used a portion of the 1893 McNiven decreed water right to irrigate the school trust land they were leasing from the State of Montana, they were acting on behalf of the State, and, upon its beneficial use thereon, that portion of the water right attached and became appurtenant to the Montana school trust land and owned by the State of Montana. The TLMD supports its argument by citing the holding of the Department of State Lands v. Pettibone.

² See e.g. Castillo v. Kunnemann, 197 Mont. 190, 642 P.2d 1019 (1982); Maclay v. Missoula Irr. Dist., 90 Mont. 344, 3 P. 2d 286 (1931); Yellowstone Valley Co. v. Assoc. Mort. Investors, 88 Mont. 73, 290 P. 255 (1930); St. Onge v. Blakeley, 76 Mont. 1, 245 P. 532 (1926); Lensing v. Day & Hansen Security Co., 67 Mont. 382, 215 P. 999 (1923); Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334 (1905); Hays v. Buzard, 31 Mont. 74, 77 P. 423 (1904); Smith v. Denniff, 24 Mont. 20, 60 P. 398 (1900); Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Woolman v. Garringer, 1 Mont. 535 (1872); and Donnell v. Humphries, 1 Mont. 518 (1872).

Twenty-three water rights were involved in the Department of State Lands v. Pettibone appeal. 216 Mont. at 365. Four rights were for groundwater wells developed and used wholly on school trust land. One right was for a groundwater well which straddled the border between trust land and private land and was used on both. Three rights were in developed springs located and used on trust land. Thirteen of the rights were for diversions from streams on trust land for use on trust land. One water right was in a reservoir on trust land for stockwater use on both trust land and private land. One right was for a diversion on trust land for irrigation on both trust land and private land. All of the water rights were diverted, developed, and perfected on school trust land as "use rights" after the original appropriators acquired their leases from the State of Montana.

The Montana Supreme Court focused its analysis and decision on the special character of the land as "school trust land" and the role of the State of Montana as "trustee" of those lands. *See generally, Pettibone*, 216 Mont. at 365-366, 368-371, 375. The Court found that "the State holds these lands subject to the school trust. The essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such property does so 'subject to the trust.'" *Ibid.* at 375. The Court distinguished school trust land from the public domain, private land, and other public land in general, and applied three important principles previously articulated by the United States Supreme Court in school trust land cases: (1) trusts created by the enabling acts are similar to private charitable trusts; (2) the enabling acts creating school trusts must be strictly construed according to fiduciary principles; and (3) enabling acts, in general, preempt State law and constitutions. *Ibid.* at 369, *citing Trustees of Vincennes University v. State of Indiana* (1852), 55 U.S. 268; *Springfield Township v. Quick* (1859), 63 U.S. 56; and *Andrus v. Utah* (1980), 446 U.S. 500.

The Pettibone Court noted the tradition of both the United States Supreme Court and the Montana Supreme Court of acknowledging and protecting the essential trust nature of school land and the necessity to preserve the value of the trust corpus for its intended beneficiaries. The Court's analysis focused particularly on the school trust principles applied in Lassen v. Arizona, 385 U.S. 458 (1967) and Jerke v. State Dept. of Lands, 182 Mont. 294, 597 P.2d 49 (1979), from which it drew and applied the following two rules:

"First, an interest in school land cannot be alienated unless the school trust receives adequate compensation for that interest. Water that is appurtenant to the school lands is an interest for which the trust must

receive compensation.

Second, any law or policy that infringes on the state's managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land."

Ibid. at 371.

Based on these special school trust land rules, the Pettibone Court distinguished school trust land cases from public domain, public trust, and federal reserved water right cases. The Court found that a special relationship exists between the lessees of school trust lands in Montana and the State of Montana as trustee of those lands. Ibid. at 368. It is a relationship in which:

The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State....The lessee, under the terms of the lease, is simply entitled to the use of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefore.

Ibid. (emphasis added) *See also* 375-376.

As the lessee of school trust land is acting on behalf of the State when making appropriations on and for school trust sections, title to the water right vests in the State, not the lessee. Ibid. at 368, 375-376. Under Montana law, where the owner of a water right also owns the land on which the water is put to beneficial use, the water right is usually deemed to be incidental or appurtenant to the land, and remains appurtenant thereto until severed from the land by the owner of the water right. Section 70-15-105, MCA. *See discussion, infra*, at pp. 16-18. Therefore, the Pettibone Court deemed the 23 water rights at issue to be appurtenant to the school trust land. Ibid. at 368. As an interest in the land (trust), they could not be surrendered by the State without receiving fair market value for the rights. Ibid. at 371, 373. As none of the lessees in Pettibone alleged payment of consideration to the State apart from the lease payments, the Court concluded that all 23 water rights were owned by the State of Montana:

We hold that the lessee, under the terms of the school lease, is entitled to the use of water appurtenant to the leased land. The State is the beneficial user thereof, and its duty as trustee of the school lands prohibits it from alienating this interest in the land absent full compensation therefor. Absent such compensation, the title to the water rights in this case vest in the State.

Ibid. at 376.

Pettibone is Distinguishable

Title to the school trust land involved in this case vested in the State of Montana upon its admission to the Union, even though the patent was not issued to the State until 1943.³ However, as shown by the findings, this claim is based on a water right diverted in 1893 from a point on the Shields River off school trust land for use on land owned by the appropriator. It was subsequently decreed in 1911 to be owned by the appropriator and appurtenant to his private land. Therefore, it was already a positive, certain and vested property right before it was ever used on school trust land. For such a water right, a different set of rules applies. As the Pettibone Court, itself, emphasized:

Respondents cite several cases that appear to articulate a contrary rule. The first, Smith v. Denniff ... is distinguishable in the fact that it concerned water appropriations made ... on federal lands who diverted water for use on the public domain....As discussed above, school trusts lands are subject to a different set of rules than other public lands."

* * *

Secondly they cite Hayes v. Buzzard [sic]... for the rule that the question of whether water is appurtenant to the underlying land turns upon the intention of the appropriator. Again, Hays arose on public domain land, not school trust land. This Court recognized that distinction....

Pettibone, 216 Mont. at 372-373, 702 P.2d 948. (emphasis added)

Prior Appropriation on the Public Domain

Water law in the State of Montana was born in the rough and primitive gold fields of California, where an enforceable water right was acquired simply by taking the waters of the public domain and putting them to beneficial use, with first in time being first in right.⁴ Those

³ In United States v. Wyoming, the United States Supreme Court held that: "The interest of the State vests at the date of its admission into the Union only as to those sections which are surveyed at that time and which previously have not been disposed of by the Federal Government." 331 U.S. 440, 443-444, 91 L. Ed. 1590, 1593 (1946). See also Clemmons v. Gillette, 33 Mont. 321, 326, 83 P. 879 (1905).

⁴ See generally Matter of Dearborn Drainage Area, 234 Mont. 331, 340, 766 P.2d 228 (1988); Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921); Maynard v. Watkins, 55 Mont. 54, 173 P. 551 (1918); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Smith v. Duff, 39 Mont. 382, 389, 102 P. 984 (1909); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897); Kleinschmitt v. Greiser,

customs ripened into well recognized rules that were subsequently adopted and given the force of law by Montana's territorial and State legislatures and courts.⁵ From an early date, the United States Supreme Court acknowledged that Montana's water law was fixed and regulated by these local customs, rules and court decisions,⁶ and in 1866, they received the formal confirmation of Congress.⁷ Broder v. Natoma Water and Mining Co., 101 U.S. 274 (1879); Atchison v. Peterson, 87 U.S. 507, 512-513 (Mont. Terr. 1874).

As the territory became increasingly settled, the great value and complexity of water use became more apparent, Miles v. Butte Electric Co., 32 Mont. 56, 67, 79 P. 549 (1905), and the sparse descriptions and applications of the early doctrine were augmented by interstitial rulings and dicta of the Montana Supreme Court.⁸ By 1900, the Montana Supreme Court described the appropriation doctrine in Montana in more complete terms as follows:

14 Mont. 484, 37 P. 5 (1894); Sweetland v. Olsen, 11 Mont. 27, 27 P. 339 (1891); Woolman v. Garringer, 1 Mont. 535 (1872); King v. Edwards, 1 Mont. 235, 239 (1870). See also Atchison v. Peterson: By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the US, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property, 87 U.S. 507, 510 (Mont. Terr. 1874); Basey v. Gallagher: The views [in Atchison v. Peterson] expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and territories by the custom of miners or settlers or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial use, 87 U.S. 670, 682 (Mont. Terr. 1874); and Broder v. Water Company, 101 U.S. 274 (Cal. 1879).

⁵ See e.g. King v. Edwards, 1 Mont. 235, 239 (1870) ("The mining customs of any particular mining district [in Montana] have the force and effect of laws, or, in other words, are laws.") See also Bailey v. Tintinger, 45 Mont. 154, 166, 122 P. 575 (1912) ("These customs formed a part of our unwritten law, or, as it might more aptly be termed, the common law of this country as distinguished from the common law of England.")

⁶ Basey v. Gallagher, 87 U.S. 670 (Mont. Terr. 1874); Atchison v. Peterson, 87 U.S. 507 (Mont. Terr. 1874).

⁷ Section 9 of the Act of 1866 provided that: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same...."

⁸ As Justice Holloway pointed out in Mettler v. Ames: "It may be conceded that in each instance the observations were not necessary to the decision rendered, but they do, respectively, represent the views of the distinguished jurists who in the early days were largely instrumental in formulating the public policy of Montana respecting this subject." 61 Mont. 152, 169, 201 P. 702 (1921). Thus, although not necessarily of precedential value, it is certainly instructive and persuasive.

We recognize the doctrine that right to the use of water may be owned without regard to the title to lands upon which the water is to be used; that is, that a right to the use of water is a possessory one, that may be obtained by actual appropriation and diversion, perfected by application of the water so appropriated to a beneficial use then present or contemplated, and made before appropriation and use by another. But, as every appropriation must be made for a beneficial or useful purpose (section 1881, Civil Code), it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof....

Toohy v. Campbell, 24 Mont. 13, 17-18 (1900). (emphasis added)

When appropriated on the public domain in compliance with law, legal title to the water right vested in the appropriator. It was "a positive, certain, and vested property right," of which the appropriator could be divested only through the exercise of Constitutionally provided powers, such as eminent domain or the general police power, with due process of law. Smith v. Denniff, 24 Mont. 20, 27, 60 P. 398 (1900). See also In Matter of Adjudication of Yellowstone River Water Rights, 253 Mont. 167, 173-174, 832 P.2d 1210 (1992);⁹ Pettibone, 216 Mont. at 375; Osnes Livestock Co. v. Warren, 103 Mont. 284, 294, 62 P.2d 206 (1936); and St. Onge v. Blakely, 76 Mont. 1, 18, 245 P. 532 (1926). Legal title to the land upon which such a water right was used or intended to be used did not affect the appropriator's title to the water right. Smith, 24 Mont. at 29. The above principles were summarized by the Montana Supreme Court in St. Onge v. Blakely as follows:

The right to use water ... is a possessory right which may be acquired by appropriation and diversion for a beneficial use; such a right can be acquired by a squatter on public lands, or one holding lands under contract for its purchase (citations omitted) and, once the right is acquired, its owner cannot be deprived thereof by a conveyance of the land by the land owner. (citations omitted).

76 Mont. at 18. (emphasis added)

⁹ The Court takes judicial notice that the Montana Supreme Court has found that: "While these [water] rights are protected against unreasonable state action....they have not been granted indefeasible status." In Matter of Adjudication of Existing Rights in Mussellshell River Drainage Area, 255 Mont. 43, 48, 840 P.2d 577 (1992), citing to In Matter of Adjudication of Yellowstone River Water Rights, 253 Mont. 167, 173-174, 832 P.2d 1210 (1992).

Attachment of Water Rights to Land

Mere possession of a water right originated by another does not establish ownership of the water right. St. Onge, 76 Mont. at 19; Kenck v. Deegan, 45 Mont. 245, 249, 122 P. 746 (1912). Privity of title must exist between the claimant and the original appropriator of the water right. Ibid. at 19. See also Head v. Hale, 38 Mont. 302, 308, 100 P. 222 (1909), and Hays v. Buzard, 31 Mont. 74, 82, 77 P. 423 (1904). Privity of title may be established by (1) an express conveyance of the water right, Castillo v. Kunnemann, 197 Mont. 190, 197-198, 642 P.2d 1019 (1982); (2) a contractual relationship with the original appropriator, together with immediate possession of the land and water, St. Onge, 76 Mont. at 12-14; or (3) an express conveyance of land to which the water right is appurtenant. Spaeth v. Emmett, 142 Mont. 231, 237, 383 P.2d 812 (1963); Hays, 31 Mont. at 82; and Smith, 24 Mont. at 28.

It is well settled that a water right may pass as an appurtenance to land in Montana. 1 Wiel, Water Rights in the Western States §550 (1911). See also 1 Hutchins, Water Rights Laws in the Nineteen Western States 469 (1971). "[W]hether a water right passes as an appurtenance involves two questions: (a) Whether the water right is an appurtenance, and (b) whether, being such, it was intended to pass. Both of these are questions of fact in each case." Ibid. (emphasis added) See e.g. Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 83, 290 P. 255 (1930); Lensing v. Day & Hansen Security Co., 67 Mont. 382, 384, 215 P. 999 (1923); Custer Consolidated Mines Co. v. City of Helena, 52 Mont. 35, 43, 156 P. 1090 (1916); Bullerdick v. Hermsmeyer, 32 Mont. 541, 550, 81 P. 334 (1905); Donnell v. Humphries, 1 Mont. 518, 524-525 (1872).

Montana statute has long provided that "[a] thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit...." Section 70-15-105, MCA, preceded by § 67-211, RCM 1947. Thus, the Montana Supreme Court has directed that "[w]hen a water right is acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, it is an appurtenance thereto and, as such, passes with the conveyance of the land, unless expressly reserved from the grant." Yellowstone, 88 Mont. at 84. See also Castillo, 197 Mont. 196; Adams v. Chilcott, 182 Mont. 511, 518, 597 P.2d 1140 (1979); Schwend v. Jones, 163 Mont. 41, 515 P.2d 89 (1973); Lensing, 67 Mont. at 384; and Sweetland v. Olsen, 11 Mont. 27, 29, 27 P. 339 (1891).

These directives, however, do not propound an inflexible rule, for the Court has also found that "the fact that [a water right] has been used at this or that place, or upon particular land, will not of itself determine its character as an appurtenance." Hays, 31 Mont. at 82. *See also* Hutchins, *supra*, at 471. As the appropriator and his successor are entitled to change the place of use and to sever and reserve or convey the water right apart from the land on which it is used, a legally acquired water right is akin to an easement in gross, which, according to circumstances, may or may not be an easement annexed or attached to certain lands as an appurtenance thereto. Maclay, 90 Mont. at 353. Therefore, whether a water right attaches as an appurtenance to land in Montana is a question of fact, and the burden of proof is on the party asserting ownership by appurtenancy. Yellowstone Valley, 88 Mont. at 82; Custer Consolidated Mines, 52 Mont. at 43; Donnell, 1 Mont. at 524-525.

Given its similarity to an easement in gross, unity of title between the owner of a water right and owner of the land is required before the Montana Supreme Court will *deem* a water right appurtenant to land pursuant to the statute. Smith, 20 Mont. at 27-28. Where there is no such unity of title, a water right is not deemed appurtenant to land until either the owner of the water right obtains title to the land or conveys the water right to the owner of the land, or the facts and circumstances of the case indicate *intent* on the part of the water right owner to make the water appurtenant to the land. Smith, 20 Mont. at 28.¹⁰ The Smith Court applied this principle in a landlord-tenant situation as follows:

Section 1078 [now 70-15-105, MCA] may not be interpreted to mean that a water right acquired by prior appropriation by one who has only possessory title to the land, although with the intent at the time to use the water upon such land, shall, by the mere act of using it as

¹⁰ In the case of a water right appropriated by a squatter in possession of land taken in good faith upon the public domain, the water right could become appurtenant to land before legal title (patent) was acquired, if the facts and circumstances established that the claimant had appropriated and used the water for the benefit of the land, and that he intended the water right to become appurtenant to the land. *See e.g.* Cook v. Hudson, 110 Mont. 263, 278, 103 P.2d 137 (1940) (overruled on other grounds by Grimesly v. Spencer, 206 Mont. 184, 198, 670 P.2d 85 (1983)); Geary v. Harper, 92 Mont. 242, 248, 12 P.2d 276 (1932); St. Onge 76 Mont. at 14; Wood v. Lowney, 20 Mont. 273, 277, 50 P. 794 (1897); and McDonald v. Lannen, 19 Mont. 78, 85-86, 47 P. 648 (1897).

For further applications demonstrating the flexibility of the rule and focus on the intent of the grantor, *see* Maclay, 90 Mont. at 353-354; Yellowstone Valley, 88 Mont. at 82; St. Onge, 76 Mont. at 18-19; Warren v. Senecal, 71 Mont. 210, 219, 228 P. 71 (1924); Lensing, 67 Mont. at 384; Sayre v. Johnson, 33 Mont. 15, 20, 81 P. 389 (1905); Bullerdick, 32 Mont. at 553-554; Hays, 31 Mont. at 82-83; Toohy v. Campbell, 24 Mont. at 17-18; and Donnell, 1 Mont. at 531-532.

intended, become inseparably attached as an appurtenance, and the appropriator thereby lose his water right. Such an interpretation would not only violate recognized custom and legal principles, but would render inoperative the provisions of Section 1882 [change in place of use] of the Civil Code.

Smith, 24 Mont. at 30. The Smith Court therefore concluded that:

The common-law rule that an easement acquired by a tenant as an appurtenant to the land inures to the benefit of the landlord upon the expiry of the tenancy (citations omitted) is, for the reasons we have stated, inapplicable to cases arising under the statutes in respect of prior appropriation of water rights.... Ibid.

Transfer of Appurtenant Water Rights

Whether a water right appurtenant to particular land passes with a conveyance of the land is also a question of fact. Yellowstone Valley, 88 Mont. at 84. Montana statute provides that "[t]he transfer of a thing transfers also all its incidents unless expressly excepted." § 70-1-520, MCA. Accordingly, the Montana Supreme Court has held that:

[T]he governing rule is that everything essential to the beneficial use and enjoyment of the property conveyed is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.

Yellowstone Valley, 88 Mont. at 84.

The right of a claimant to title to a water right based on appurtenance, therefore, typically depends on the interpretation of deeds furnishing the chain of title. Hays, 31 Mont. at 82.¹¹ "In a conveyance of a water right or any other property, it is the intent of the parties, so far as the same has been lawfully expressed, which must control the courts in the construction of the instrument by which the property is conveyed." Lensing, 67 Mont. at 382-383. See also Yellowstone

¹¹ In the case of a water right appropriated by a squatter in possession of land taken in good faith upon the public domain, the Court has held that "no deed was necessary, for one who has settled upon and is in possession of public lands of the United States may convey his right in the same, together with a water right appurtenant thereto, orally and for or without consideration, to one who takes possession thereof." St. Onge, 76 Mont. at 14. See also Cook v. Hudson, 110 Mont. 263, 278, 103 P.2d 137 (1940) (overruled on other grounds by Grimesly v. Spencer, 206 Mont. 184, 198, 670 P.2d 85 (1983)); Geary v. Harper, 92 Mont. at 248; Wood v. Lowney, 20 Mont. at 277; and McDonald v. Lannen, 19 Mont. at 85-86.

Valley 88 Mont. at 84.¹² When the deed does not specify the particular appurtenant right intended to be conveyed, extrinsic evidence must be used to establish it. Bullerdick, 32 Mont. at 550; Hays, 31 Mont. at 82; and Donnell v. Humphreys, 1 Mont. at 526. The question becomes: "What rights ... does the [claimant] appear to have acquired in the water under that deed, in light of the facts as they then existed, and the behavior of the parties with reference to it?" Hays, 31 Mont. at 82.

Water Right Claim No. 43A-W-042435-00

The 450 miner's inches of water on which this claim is based was diverted by Alexander and John McNiven from the Shields River at a point over two miles off school trust land for the irrigation of private land pursuant to the Laws of 1887. It was subsequently adjudicated in the 1911 Shields River Decree as owned by J.B. McNiven and appurtenant to McNiven's private land. Having been appropriated and perfected in compliance with Montana law, it became a vested property right, and neither McNiven, nor his successors in interest, could be divested of it for public use except through constitutional means.

The Dinsdales (Kunnemanns' immediate predecessors) acquired the McNiven land, which now included the NE1/4 of Section 16, by mesne conveyance in 1963. As there was no evidence of intent to sever or reserve the water right in the conveyances, the appurtenant water right transferred to the Dinsdales with conveyance of the land. The Dinsdales also leased school trust land in the W1/2 of Section 16, and they used 154 inches of the decreed water right to irrigate both 30 acres of their private land in the NE1/4 and 35 acres of the school trust land, moving the water between the two tracts as needed and as conditions permitted.

As the Dinsdales owned both the water right and the private land in the NE1/4 of Section 16, and there was no evidence of a contrary intent, that portion of the water right used to irrigate the 30 acres became appurtenant to it. Although the water right was used from time to time on school trust land, no part of the water right became appurtenant to that school trust land, because there was no unity or privity of title to the land and water between the Dinsdales and the State of Montana, and no evidence of intent to make the water right appurtenant to the school trust land. Even though the Dinsdales were lessees of the school trust land, they were not acting on behalf of

¹² For rules of construction, *see generally*: Van Hook v. Jennings, 56 St. Rep. 767, 768, 295 Mont. 409, 412-413, 983 P.2d 995 (1999); Morningstar Enterprises, Inc. v. Grover, 247 Mont. 105, 111, 805 P.2d 553 (1991); and Musselshell Farming & Livestock Co. v. Cooley, 86 Mont. 276, 283 P. 213 (1929).

the State when they succeeded to ownership of the water right, or when they used it to irrigate the school trust land. Their intent was merely to temporarily change the place of use of their private, vested water right. When the Dinsdales conveyed the land in the NE1/4 of Section 16 to the Kunnemanns without a reservation or exception of the water right, their intent was to transfer the water right with the land as an appurtenance to it. The Kunnemanns also succeeded to the Dinsdales' lease of the school trust land and continued the practice of using the water to irrigate both the 30 acres of private land in the NE1/4 and the 35 acres of school trust land. Like their predecessors, even though the Kunnemanns were lessees of the State and temporarily used the water from time to time on school trust land, they intended to keep their vested right attached as an appurtenance to their private land, including the 30 acres in the NE1/4 of Section 16. When the Kunnemanns transferred their land to the bank in lieu of foreclosure, they intended the 154 inch water right to transfer with the land. When the Leahys subsequently acquired the land by mesne conveyance without a severance or reservation of the water right, they acquired all but the Harpers' portion of the 154 inch water right appurtenant to it.

Waiver and Judicial Estoppel

As an alternative theory, the State of Montana argues that the Leahys waived their right to object to the State's claim of ownership of a portion of Claim 43A-W-042435-00 by failing to raise or object to the issues of (1) total irrigated acreage on State land, (2) the effect of the 1904 right, and (3) the validity of Kunnemanns' filing on the State land at the time of the temporary preliminary decree and subsequent Master's Report amending the decree. The State also appears to argue that the doctrine of judicial estoppel prevents the Leahys from now asserting ownership of the that part of the water right claimed and decreed for use on school trust land, after they acquiesced to the Findings of Fact set forth in the Master's Report, filed March 19, 1992. An Order Adopting the Master's Report was filed on April 13, 1992, which amended the Temporary Preliminary Decree for the Shields River Basin (43A).

Waiver is an equitable doctrine, applicable only where there is intentional or voluntary relinquishment of a known right, claim or privilege. Estate of Pelzman, 261 Mont. 461, 465, 863 P.2d 1019 (1993). The Leahys did not waive their right to object to DSL's interest in this claim for three reasons.

First, Leahys or their predecessors were not statutorily required to file objections to

any water right claim contained in the Shields River Temporary Preliminary Decree when the decree was issued in 1988, because a subsequent preliminary decree eventually will be issued. A person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree issued before March 28, 1997. Section 85-2-233(1)(c), MCA.

Second, the Leahys or their predecessors could not have waived their right to object to DSL's interest in this claim, because both Leahys and the DSL were unaware of DSL's interest in this claim until long after the 1989 deadline to file objections to claims in the Shields River Temporary Preliminary Decree expired. Even though the Supreme Court issued its Pettibone decision in 1985, the DSL affirmatively declined to accept a portion of the water right claim when it was offered in 1990 to DSL by the Williams, State lessees. The DSL, now TLMD, readily admits in its proposed finding of fact 28 that it was "apparently confused" as "to whether it had a right to claim a portion of this water right, since it was diverted off of state land" and that it was only "sometime after 1991 that the state began asserting an interest in all water rights perfected on state lands regardless of place of diversion." (Trust Lands' Brief and Amended Proposed Findings, Conclusions and Order, page 9. See also proposed finding 11 at page 5.) If the DSL was so "confused" over its ownership interest in this claim that it actually declined to accept the 1990 offer from Williams, then Leahys or their predecessors certainly cannot be said to have knowingly waived any right to object to DSL's ownership interest in this claim in 1989.

Third, the statement of claim is *prima facie* proof of its content. Section 85-2-227(1), MCA. The claim does not identify the State as the owner. Therefore, the burden to contest ownership was on the State and not on the Leahys or their predecessors. See Conclusion of Law III.

Consequently, without an obligation to object or notice of the State's claim of ownership, the Leahys or their predecessors cannot have intentionally or voluntarily waived their right to object to the State's ownership interest in this claim.

The TLMD argument on the doctrine of judicial estoppel is also not applicable. The doctrine estops litigants from asserting inconsistent or contradictory positions in separate litigation. Caekaert v. State Fund, 268 Mont. 105, 115, 885 P.2d 495 (1996). The doctrine only applies to those statements that have misled the adverse party and if accepted would injuriously affect the adverse party. Fieldler v. Fieldler, 266 Mont. 133, 139-140, 879 P.2d 675 (1994). "Stated simply, it is a rule which 'estops a party to play fast-and-lose with the courts' (citation omitted)." Fieldler,

The TLMD argues that when the Leahys offered evidence in 1992 to the Water Master by affidavit and attached Daniel Dinsdale's 1991 letter showing the historical irrigable acreage under the water right on both their deeded land and the State school trust land, they acquiesced in the extent of irrigable acreage under the water right appurtenant to the State land as well as their own land and are estopped from asserting an inconsistent position now. (Trust Lands' Brief and Amended Proposed Findings, Conclusions and Order at page 13). The TLMD presented no evidence that it was misled by Leahys' prior positions.

The Leahys' 1992 effort does not contradict their current court filings. In their 1992 affidavit, the Leahys claimed to be the owners of Water Right 43A-W-042435-00 with a flow rate of 3.85 [cfs], which they purported was used on 30 acres of deeded land in the N1/2 of Section 16. To this affidavit was attached a letter from Daniel Dinsdale that his father had "154 inches of water, rate of flow was 3.85," [cfs] to irrigate 30 acres of deeded land in the N1/2 of Section 16 and 35 acres of leased land in the W1/2 of Section 16; and that all of his father's water rights were intended to transfer with the land. In 1991, Harry and Alice Williams filed their affidavit, by which they purported to be the owners of that portion of the water right used on school trust lands. In 1992, the Water Master relied on these affidavits and found that this 3.85 cfs claim was beneficially used, prior to July 1, 1973, on the 65 acres described in the Dinsdale letter. The State's claim of ownership was not an issue.

In the proceedings subsequent to 1992, the Leahys have not proposed a different historical place of use. Leahys merely petitioned the DNRC for authorization to remove a portion of their claimed water right historically used on school trust lands and to transfer the beneficial use of that water to their private land. As a result, they have been required to participate in this proceeding to defend their ownership of a portion of the claim. Their current position is not inconsistent with their previous position and did not mislead the TLMD. Whatever confusion and inconsistency that has arisen regarding ownership of this water right claim mostly results from TLMD's change in policy after 1991, the resulting presentation of a complex legal issue, a water right transfer process that could only raise a legal issue and not solve it, and a cumbersome procedure to bring the issue to the Water Court for resolution.

Conclusion

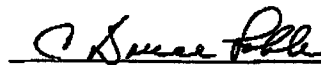
The State of Montana has failed to meet its burden of contradicting and overcoming the Leahys' claim of ownership. As this water right was diverted, developed and perfected on private land, and decreed to be privately owned and appurtenant to private land before it was used on school trust land, the holding in Department of State Lands v. Pettibone does not apply.

The facts and circumstances here show that the water was intended to be and was appurtenant to private land, including 30 acres in the NE1/4 of Section 16. Temporary use of the water on school trust land did not make the water appurtenant to the school trust land, because there was no unity or privity of title between the successive owners of the water right and the owner of the school trust land, no intent to make the water appurtenant to the school trust land, and no conveyance of the water right to the State in writing. When the Leahys became successors to the private land without a severance or reservation of the water right, they acquired the 154 inch water right appurtenant to the land, less only that portion previously conveyed to the Harpers.

Just as it would make no sense to allow each succeeding tenant to appropriate and "walk off" with one water right after another diverted and developed on and for, and appurtenant to, school trust land, it would make no sense to allow the State to "take" one vested right after another from unsuspecting lessees who merely intend to apply their vested water rights for temporary use on school trust land. While school trust land may temporarily benefit from a lessee's private water right, TLMD is not entitled therefore to convert that fortuitous effect into a permanent asset of the trust estate. While the State's fiduciary role as charitable trustee clearly prohibits it from surrendering interests of the trust estate without receiving full market value, a private existing water right such as this right was never an "interest" of the trust estate to begin with and should not be considered part of its value.

The TLMD's motion for declaratory relief determining the State of Montana to be the owner of that portion of Claim 43A-W-042435-00 used on school trust land in Section 16, Township 1 South, Range 10 East, M.P.M., is **DENIED**.

DATED this 29 day of June, 2000.



C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Lori M. Burnham Beck, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Dennis J and L Darlene Leahy
3989 Salt Spring Dr.
Ferndale WA 98248

Joseph D & Julie C Harper
HC 85 Box 4275
Livingston MT 59047

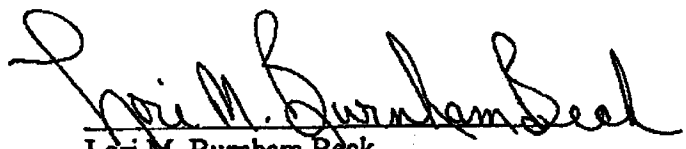
A. Suzanne Nellen, Attorney
1800 W Koch Suite 5
Bozeman MT 59715

Tommy H. Butler, Attorney
Dept. of Natural Resources and Conservation
PO Box 201601
Helena MT 59620-1601

Richard D. & Gay W. Juhnke
PO Box 1327
Livingston MT 59047

Courtesy Copy to:
Richard E. Bach
837 Catherine Ave
Holly Hill FL 32117

DATED this 29 day of June, 2000.


Lori M. Burnham Beck
Clerk of Court

Knista Lee Evan
Sr WRC/AGA1
406-439-2215

No. 83-281

IN THE SUPREME COURT OF THE STATE OF MONTANA

1985

IN THE MATTER OF THE ADJUDICATION
OF THE EXISTING RIGHTS TO THE USE
OF ALL THE WATER, BOTH SURFACE AND
UNDERGROUND, WITHIN THE POWDER RIVER
DRAINAGE AREA, INCLUDING ALL TRIBU-
TARIES OF THE POWDER RIVER IN CARTER,
CUSTER, FALLON, PRAIRIE, and POWDER
RIVER COUNTIES, MONTANA,
DEPARTMENT OF STATE LANDS,

Objector and Appellant,

-vs-

WALTER PETTIBONE, DAVID and MELINDA
BLISS, ERNEST and PEGGY TOOKE,
GIACOMETTE RANCH, P.J. RANCH, ELMER
OEDEKOVEN, E. AMORY HUBBARD, CINCH
BUCKLE RANCH, MALLET CATTLE COMPANY,
ROBERT F. HARDY TRUST, ALVIN and HELEN
IRION, HARDY LAND & LIVESTOCK COMPANY,
and BALES RANCH,

Claimants and Respondents.

APPEAL FROM: The Water Courts of the State of Montana,
The Yellowstone Division-Powder River Basin,
The Honorable W.W. Lessley, Chief Judge.

COUNSEL OF RECORD:

For Appellant:

Lyle Manley argued, Dept. of State Lands, Helena,
Montana; John F. North, Dept. of State Lands

For Respondents:

John Carr argued for Bliss & Bales Ranch, Miles City,
Montana

For Amicus Curiae:

Albert W. Stone, U of M Law School, Missoula, Montana
Gough, Shanahan, Johnson & Waterman; Ronald F. Waterman
argued for Montana Stockgrowers Assoc., Helena,
Montana

Submitted: February 21, 1985

Decided: June 18, 1985

Filed: JUN 13 1985

Ethel M. Harrison

Clerk

Mr. Justice L. C. Gulbrandson delivered the Opinion of the Court.

The State of Montana appeals from the Powder River Final Decree holding title to certain water rights to be vested in respondents. We reverse.

The State of Montana, Department of State Lands, objected to the portion of the Powder River Preliminary Decree that awarded title of certain water rights to the above-named respondents, all lessees of State school trust lands. All of the factual disputes, as to flow, source and place of diversion and place of use were resolved prior to the hearing on the State objection held November 24, 1982. The hearing was confined solely to the following question of law:

Does title to the water right vest in the lessee or the State of Montana as owner of the land where the water is diverted?

On April 4, 1983, The Water Courts Judgment--The Powder River Final Decree, was issued. It held that the title to the waters diverted on State school trust lands vests in the lessee, and not the State.

The State appealed this portion of the Final Decree. The appeal was first heard by this Court on January 13, 1984. Subsequently, by Order of March 26, 1984, we directed the parties to rebrief the case, and to address certain questions. Because of the broad significance of this case, we also solicited amicus curiae participation. The parties, and several amici, submitted supplemental briefs, and the matter was again heard on January 25, 1985.

There are twenty-three water rights involved in this appeal. They generally fall into one of the following categories:

- 1) Groundwater Wells: Four rights are from groundwater wells. Three of the

wells are on school trust lands, and used wholly thereon. One straddles the border between a state-owned and privately-owned section, and is used on both.

2) Developed Springs: Three rights are in developed springs for stock watering. The springs, and their uses, are confined to the school trust lands.

3) Diversions of Tributaries: Fifteen rights arise from diverting named or unnamed tributaries of larger creeks. In most, the appropriator has constructed a small dam on the tributary creating a small reservoir for stock watering. In some instances, water continues to flow from the reservoirs to the larger creek. One of the rights involves a draw of water from the Powder River devoted to irrigation, not stockwatering.

Thirteen of these diversions occur wholly on school trust lands with the use confined thereon. One right is in a reservoir on state land that serves both the state section and an adjacent private section. The last of these rights is an appropriation used for irrigation. In that case, the diversion is on state land, and the use is on both state and private land.

4) Direct Use: One right is in an undeveloped spring and its drainage adjacent to a creek in the Powder River drainage. The spring, and its use, is confined to the school trust land. This right has the oldest priority date of any at issue here, October 1, 1883.

According to the decrees associated with these rights, each is exercised year-round; although in times of drought, this may not be possible.

The lands upon which these water rights lie are those that were granted to the State of Montana by the Federal Government in the Montana Enabling Act. Act of February 22, 1889, ch. 180, 25 Stat. 676. Originally, these lands were set aside in the Montana Territory Organic Act, Act of May 26, 1864, ch. 95, 13 Stat. 85, which provided that said lands were "reserved for the purpose of being applied to schools" ch. 95, section 14, 13 Stat. 91 in the Montana Territory.

The Enabling Act granted these lands to the state on the following terms:

"Section 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools.

". . .

"Section 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased . . . " ch. 180, 25 stat. 679.

The 1889 Montana Constitution accepted these lands and provided that they would be held in trust consonant with the terms of the Enabling Act, Montana Constitution of 1889, art. XVII, sec. 1. The 1972 Montana Constitution continued these terms, Mont. Const. art. X, sec. 11, ch. 1. See also section 77-1-202, MCA (school lands held in trust for the support of education).

The duty of administering the school trust lands is placed upon the Board of Land Commissioners (Board). Section 77-1-202(1), MCA provides that "The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the State." Pursuant to 77-1-301(1), MCA, the Department of State Lands, (DSL) under the direction of the Board, " . . . has charge of the selecting, exchange, classification, appraisal, leasing, management, sale, or other disposition of state lands" The Department of State

Lands has also promulgated regulations governing the management, sale or lease of school trust lands. See generally Title 26, A.R.M.

Each of the respondents is a lessee of one or more sections of school trust lands. The DSL, by statute, sections 77-6-115 and 77-6-301 and -302, MCA, and by regulation §26-3.123, A.R.M., allows lessees to divert waters on the leasehold, develop them, and put them to use on or off that land. None of the rights at issue in this case were perfected pursuant to the above mentioned statutes or regulations. Rather, the lessees claim these rights as "use rights," which have long been recognized in this State, see *Murray v. Tingley* (1897), 20 Mont. 260, 50 P. 723, and Stone, Montana Water Law for the 1980's, p. 3, (1981 ed.)

These rights are at issue because of the general water rights adjudication underway in Montana. This process began with the passage of the Montana Water Use Act of 1973, ch. 452, L. 1973. The legislature enacted the Water Use Act in response to the chaos of previous Montana water law. See Stone, The Long Count on Dempsey: No Final Decision in Water Rights Adjudication, 31 Mont.L.Rev. 1 (1969); Stone, Are There Any Adjudicated Streams in Montana? 19 Mont.L.Rev. 19 (1957). It set up a system of general stream adjudication administered by the Department of Natural Resources and Conservation (DNRC) and also provided, from that time on, that the statutory method was the exclusive way to acquire a water right.

Prior to 1973, there were two possible ways of perfecting a water right. First was the method provided for by statute; posting at the point of diversion and filing a notice with the county clerk, Mont. Laws 1885, secs. 6 through 10; R.C.M. (1947), 89-810 through 814. Second was

simply by putting the water to use, *Murray v. Tingley*, supra. The 1885 Act did not provide for any general adjudication of streams. Nor did it provide any mechanism by which actual uses, as opposed to claimed uses, could be ascertained. As Professor Stone, in Montana Water Law for the 1980's states, the problems the legislature addressed in 1973 were many:

"It [the old water rights system under the 1885 Act] merely provided for isolated lawsuits between particular water users over their individual rights in isolated parts of streams. The statute resulted only in piecemeal litigation, often repetitive and among the same neighbors, over and over again disputing one another's claims. [Citations omitted.] It did not lead to security in one's property rights nor to finality in determining the fair and legal distribution of water among neighboring claimants.

"But not only were the individual water users ill-served by this failure to establish water rights; the public interest also required an inventory of the state's water needs so that future negotiations or dealings with downstream states could allocate the waters of our interstate rivers." Stone, supra at p. 4.

The system of adjudication established by the 1973 Act soon encountered difficulties. First, it required the DNRC to physically inspect or discover all water rights. It soon became evident that this process would take a very long time. Six years after the 1973 Act was passed, the inspection and adjudication of the Powder River Basin, one of the smallest and relatively simplest in the State, was still in its initial stages. Second, the 1973 Act did not provide for the adjudication of federally reserved rights--presenting the spectre of concurrent, wasteful and possibly inconsistent litigation in the Federal Courts.

Responding to the shortcomings of the 1973 Act, the 1979 Montana Legislature enacted Senate Bill 76, ch. 697 L. 1979. It established a system of water courts and put upon

appropriators and users the burden of filing claims for their rights. It also provided for reserved water rights and set up a Compact Commission to negotiate the federal and Indian reserved rights. Ch. 697, sec. 27, L. 1979.

The Water Court system is charged with the final adjudication of water rights. Based upon the claims filed by users and appropriators, the court issues temporary preliminary decrees cataloging the various rights and priorities in the respective basin. All named or affected parties have, at that time, an opportunity to object to the temporary preliminary decree. If no objections are raised, the temporary decree is made final. Objections are heard and adjudged by the Water Court, with the right of appeal to this Court.

This is the first appeal we have been called on to hear from a final decree of the Water Court. In reviewing this, and subsequent final decrees, we will apply the same standards of review as any other appeal from a District Court order.

The question we consider is: Who is the owner of a water right diverted or developed on school trust land; the State or the lessee?

We hold that title to these water rights vests in the State. The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee shall be reimbursed for all capital expenditures made in putting the water to beneficial use. The lessee, under the terms of the lease, is simply entitled to the use of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands

prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefor.

The school trust lands are endowments by the United States to the State of Montana for the benefit of the common schools. A major policy of the fledgling nation was to foster public education by grants of land to newly admitted states for that purpose. Each of the thirty states carved out of the public domain received such grants, varying in the quantity granted, and terms of the grant, as national policy and political winds dictated. See generally Woodgerd and McCarthy, State School Trusts and Oil and Gas Royalty Rates, 3 Pub.Land L.Rev. 1 (1982).

Montana was admitted to the Union in 1889 along with Washington, North Dakota, and South Dakota. The Omnibus Enabling Act, supra, reflects the general policy of Congress as set out above. Even before Montana joined the Union, general principles, evolving from the judicial review of earlier enabling acts, governing the school land grant trusts were well settled. In two cases, the Trustees of Vincennes University v. State of Indiana (1852), 55 U.S. 268, 14 L.Ed. 267, and Springfield Township v. Quick (1859), 63 U.S. 56, 16 L.Ed. 256, the United States Supreme Court set out three important principles governing school trust lands: 1) that the enabling acts created trusts similar to a private charitable trust which the state could not abridge; 2) that the enabling acts were to be strictly construed according to fiduciary principles, and; 3) that the enabling acts preempt state laws or constitutions. See also Andrus v. Utah (1980), 446 U.S. 500, 520, 523, 100 S.Ct. 1803, 1814, 1815, 64 L.Ed.2d 458, 472, 474, where the United States Supreme Court reaffirmed those principles, holding that Congress imposed

upon the states a binding and perpetual obligation to use the granted lands for public education.

The courts have been very protective of the trust concept, and emphatic about the need to preserve the value of the trust corpus-the school lands. The seminal case in this regard is *Lassen v. Arizona* (1967), 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515. In Lassen, the United States Supreme Court held that the Arizona Highway Department was required to fully compensate the State Land Department (administrator of the school lands) for the value of easements taken across school lands. The Court held that the Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910) "contain[ed] 'a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose'" Lassen at 467, 87 S.Ct. at 589, 17 L.Ed.2d at 522 (quoting *Ervien v. United States* (1928), 251 U.S. 41, 47, 40 S.Ct. 75, 76, 64 L.Ed. 128, 130).

In *State of Utah v. Andrus* (D. Utah 1979), 486 F.Supp. 995, the federal district court concluded that the lessees of state school lands had an implied right of access to their leasehold across adjacent federal lands. The court felt that if it held otherwise, "the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend." 486 F.Supp. at 1002. The Court in *Utah v. Andrus* made it clear that any restriction on the use (i.e. access) of school trust land that effectively devalues it cannot be sustained.

This Court has likewise been emphatic in protecting the school trust. In *Rider v. Cooney* (1933), 94 Mont. 295, 23 P.2d 261, we first held that a lease is an "interest" in land. Then, applying the rule that interests in school trust

lands cannot be alienated for less than full value, we held that the State must also obtain full value for a lease thereof. See also *State ex rel. Galen v. Dist. Ct.* (1910), 42 Mont. 105, 112 P. 706; *Gladden Farms, Inc. v. State* (Az. 1981), 633 P.2d 325; *Arizona State Land Department v. Superior Court* (Az. 1981), 633 P.2d 330; *City of Sierra Vista v. Babbitt* (Az. 1981), 633 P.2d 333; *State v. University of Alaska* (Ak. 1981), 624 P.2d 807.

In *Jerke v. State Dept. of Lands* (1979), 182 Mont. 294, 597 P.2d 49, we addressed a situation analogous to the one at bar. The general question presented was how far the State could surrender its managerial prerogatives over school lands without violating the trust. Montana law empowers grazing districts to manage and allocate lands within their jurisdiction. This includes the power to grant preference rights to members in the re-leasing of school lands that are within the district. The plaintiff in *Jerke* contended that the preference right unconstitutionally prevented the State from receiving full fair market value for the land. Since the existing lessee who exercised the preference right was not using the land (and thus not "follow[ing] good agricultural practices and mak[ing] improvements on the land" 182 Mont. at 297, 597 P.2d at 51), we held the preference right was unconstitutional as applied. This was because:

"To allow the preference right to be exercised in this case would be to install the Grazing District as the trustee of the land. It, rather than the Department of State Lands, would decide who will occupy the land but it would not be bound by a constitutional or fiduciary duty." 182 Mont. at 297, 597 P.2d at 51.

See also *State ex rel. Thompson v. Babcock* (1966), 147 Mont. 46, 409 P.2d 808 (upholding the Commissioner's discretionary authority to accept lease terms less than the highest bid in order to effectuate sustained yield concepts and insure the

long-term strength of the trust corpus); In Re Montana Trust and Legacy Fund (1964), 143 Mont. 218, 388 P.2d 366. The Oklahoma Supreme Court in Oklahoma Education Association v. Nigh (Ok. 1982), 642 P.2d 230 has also addressed the same question as this Court did in Jerke. The Oklahoma court went further and found several state statutes limiting the amount of interest that the state could receive on school lands, and creating preferences in the re-leasing of school lands, to be unconstitutional.

Most recently, the Washington Supreme Court upheld the federal land grant trust in holding the Washington Forest Products Industry Recovery Act of 1982, R.C.W. 79.01.1331-.1339, unconstitutional. The Act was passed in response to the decline of the prices in the forest products industry at the time. It allowed the Washington Department of State Lands to release contracts previously entered into with loggers and other forest products users because the industry stood to lose a great deal, due to the decline in prices, if the contracts were enforced. The Washington Supreme Court, in Skamania County v. Washington (Wa. 1984), 685 P.2d 576, dealt with the contracts on school trust land. Premising its argument by stating: "Every court that has considered this issue has concluded that these are real enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees," 685 P.2d at 580, the court found the act had violated the trust by transferring trust assets--the contract rights--for less than their full value and held it unconstitutional. 685 P.2d at 583. See also Torve and Handy, Skamania County v. Washington: A Case of Divided Loyalties, Fall 1984, Western Natural Resources Litigation Digest Commentary 7.

The above cases establish two main points that are important when considering either minor premise leading to our decision. First, an interest in school land cannot be alienated unless the trust receives adequate compensation for that interest. Water that is appurtenant to the school lands is an interest for which the trust must receive compensation. Second, any law or policy that infringes on the state's managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land. In this case, the DSL contends that to allow lessees to develop private, personal rights on school lands would impermissibly reduce the DSL's ability to manage these lands for their highest value.

Section 70-15-105, MCA states that:

"A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse or of a passage for light, air or heat from or across the land of another."

Further, Professor Wells A. Hutchins, in his treatise Water Rights Laws in the Nineteen Western States Vol. I at 455 (U.S. Dept. of Agriculture, 1971) states: "Of general application in the West is the rule that an appropriative right becomes appurtenant to the land for the benefit of which the water is applied."

In Montana, the determination of whether water is appurtenant to the land is one of fact. Yellowstone Valley Co. v. Associated Mortgage Investors, Inc. (1930), 88 Mont. 73, 290 P. 255; see also Hutchins, supra at 459. Here, by stipulated facts, it appears that all of the water rights at issue are used either in whole or in part on the school lands. Additionally, all of the lands in question are classified grazing lands under sections 77-1-401 to -404, MCA, and the water appropriated on them is used for

stockwatering or other agricultural purposes. The water rights in question are appurtenant.

This conclusion is consistent with the general rule that when title to irrigated property is passed, the water rights pass as an appurtenance unless specifically excepted. Section 85-2-403, MCA; *Castillo v. Kunnemann* (Mont. 1982), 642 P.2d 1019, 39 St.Rep. 460; *Adams v. Chilcott* (1979), 182 Mont. 511, 597 P.2d 1140; *Schwend v. Jones* (1973), 163 Mont. 41, 515 P.2d 89. Respondents point to no authority explaining why the rule in regard to leases of land should be different than with the sale of land. We believe it should be the same--the parties to any such transaction may specifically effect a severance, but absent such, the water right remains appurtenant, following title. It does not make sense for each succeeding tenant to walk off with one water right after another.

Respondents cite several cases that appear to articulate a contrary rule. The first, *Smith v. Denniff* (1900), 24 Mont. 20, 60 P. 398, is distinguishable in the fact that it concerned water appropriations made by squatters on the federal lands who diverted water for use on the public domain. The school trust lands were withdrawn from the public domain by the Montana Territory Organic Act, *supra*, in 1866, and none of the rights at issue in this case were developed before then. As discussed above, school trust lands are subject to a different set of rules than other public lands. Secondly they cite *Hayes v. Buzzard* (1904), 31 Mont. 74, 77 P. 423 for the rule that the question of whether water is appurtenant to the underlying land turns upon the intention of the appropriator. Again, Hayes arose on public domain land, not school trust land. This Court recognized that distinction:

"The legal title to the land upon which a water right acquired by appropriation made on the public domain [emphasis added] is used or intended to be used in no wise affects the appropriators title to the water right, for the bona fide [emphasis in original] intention which is required of an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other than those of the appropriator, or a use for purposes other than those for which the right was originally appropriated." 31 Mont. at 81 77 P.2d at 425, quoting Smith v. Deniff, supra.

(See also Ervien, 246 F. at 280: "Congress did not intend that the [school trust] lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people. . . ") Respondents' argument does not answer the state's concern with meeting its trust responsibilities.

Since an appurtenant water right is an interest in the land (see also section 70-1-106, MCA; Yellowstone Co. v. Asso. Mtg. Investors, supra) it cannot be surrendered by the State without the trust receiving fair market value. None of the lessees alleged payment of consideration to the State apart from that required by the lease, and thus we conclude that the water rights appurtenant to such lands belong to the State.

The State argues that vesting title in lessees would violate the trust for another reason. If a lessee lost his lease, but retained the water right, that lessee would in effect be able to control the use of the land. In many cases in this semi-arid area, the control of water means the control of the land itself. Conceivably, the DSL, in a desire to insure that the land had water, could find itself in the awkward position of negotiating with a former lessee, who might be inclined to release his right only to family or friends--thus assuring his re-entry. The former lessee could

"chill" the bidding process by letting it be known that he would only release his right at an inflated price. Finally, the former lessee could conceivably dictate possible uses of the land in return for the water. This situation is clearly repugnant to school trust principles. This Court, in *Jerke v. State Department of Lands*, *supra*, and other courts, see *Oklahoma Education Assoc. v. Nigh*, *supra* and *State of Utah v. Andrus*, *supra*, have consistently held that any infringement on the use or management prerogatives of the State that effectively devalue school lands is impermissible. We agree, and find this to be an alternative ground for our decision.

Respondents point to section 77-6-115, MCA, which states in pertinent part that:

"(1) The lessee of state lands may at any time prior to 1 year before the expiration of his lease make application to the board for permission to secure a water right to the land under his lease. . . . If the proposed plan meets with the approval of the board, permission shall be granted the lessee to secure the desired water right for the land and to place the same under irrigation.

"(2) If such water right becomes a permanent and valuable improvement, then in case of the sale or lease of the lands to other parties, the former lessee shall be entitled to receive compensation in the amount of the reasonable value thereof, as in the case of other improvements, from the new lessee or the purchaser.

"(3) These provisions shall not be so construed as to make the state liable to the lessee for the payment of the cost or value of such irrigation improvements."

They contend that this statute, in effect, acknowledges the property interest of the lessee in the water right, and further, that in subsection (3) the State denounces any interest in the water by releasing itself from liability for the cost of irrigation improvements. Respondents also point to §26.3.123, A.R.M., which provides that the State shall

reimburse departing lessees for the reasonable value of the improvements made (as per section 77-6-115(2), MCA), and that, "[a]ny water rights hereafter secured by the lessee shall be secured in the name of the state of Montana." They argue that since §26-3.123 A.R.M. was not adopted until 1979, it does not apply to the water rights in this case because all of them predate it. They also argue that the provision lends itself to supporting the position that the State had acquiesced in recognizing pre-1979 water rights in lessees. Both of these arguments are unfounded. First, none of the alleged rights at issue in this case were perfected pursuant to section 77-6-115, MCA or §26-3.123, A.R.M. Neither provision can be used as direct authority by respondents. For that reason we are not called upon to construe section 77-6-115, MCA. We note though that it is capable of two interpretations: first, as applying to water rights as respondents argue; secondly, as applying only to improvements, such as ditches, reservoirs, headgates, and other capital projects, constructed "for" or attached "to" the land and not subject to being retained by the lessee upon payment by a new lessee or purchaser, as is the case with other improvements to the leasehold, as contended by the State. The general rule is that whenever there are differing possible interpretations of statute, a constitutional interpretation is favored over one that is not. *United States v. Clark* (1980), 445 U.S. 23, 100 S.Ct. 895, 63 L.Ed.2d 171; Sutherland on Statutory Construction §45.11 (1984 ed.). In this regard, we point to the Skamania and Nigh, decisions holding statutes unconstitutional because they violated the school trust principles established by that state's Enabling Act.

In the alternative, respondents argue that section 77-6-115, MCA, and the principles of the Water Use Act set forth in section 85-2-101, MCA, and the prior appropriation doctrine, give rise to an implied severance of water from land in the school trust land leases, and that the State is now estopped to deny these rights because of the long-standing and detrimental reliance by the lessees.

As we discussed above, the State holds these lands subject to the school trust. The essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such property do so "subject to the trust" *Nat. Audubon Society v. Superior Court* (Cal. 1983), 658 P.2d 709, 723. See also *Illinois Central Railroad v. Illinois* (1892), 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (a state may not abdicate its trust in public property); and *Thompson v. Babcock*, *supra* at 54, 409 P.2d at 812, ("[w]hen state land is leased, it does not relinquish the entire interest therein"). The State has no power, absent adequate consideration, to grant the lessees the permission to develop non-appurtenant water rights, and every school trust lease carries with it this limitation.

Respondents' argument that they have detrimentally relied upon "representations" by the State made through its laws and regulations, is not persuasive. There has been no detriment. Section 77-6-302, MCA provides that lessors will receive reasonable compensation for any improvements they have made on the leasehold if they relinquish the property to a new lessee or purchaser. Further, the argument that this rule sets up disincentives to the development of our water resources, contrary to the general policy set out in the Water Use Act of promoting the beneficial use of water, is also not persuasive. Section 77-6-302, MCA actually

insulates the developer-lessee from any market risk that he would have to bear if making improvements on his own land.

The Montana Constitution requires this result. Art. IX, sec. 3(1), provides that "all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." This provision prevents the State from affecting rights vested at the time the Constitution was adopted other than through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, sec. 29, or the general police power, and without affording due process of law, Mont. Const. Art. ~~II~~¹⁷, sec. ~~19~~. Here the State, through the adjudication process, is claiming, and this Court is recognizing rights "existing" at the time the 1972 Constitution was adopted-- Art. IX, sec. 3(1) merely reaffirms these rights.

As stated above, we hold that the lessee, under the terms of the school trust lease, is entitled to the use of water appurtenant to the leased land. The State is the beneficial user thereof, and its duty as trustee of the school lands prohibits it from alienating this interest in the land absent full compensation therefor. Absent such compensation, the title to the water rights in this case vest in the State.

Appellants and amici have urged this Court to find that school trust lands benefit from a federally reserved water right as originally recognized in *Winters v. United States* (1907), 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340, to which the State has succeeded. In our opinion, it is perhaps best to keep the reserved rights doctrine confined to situations where it arose and is most appropriate; as an accommodation between federal and state interests. Since the rule we have stated is sufficient to settle the case at bar, principles of judicial restraint counsel us to decline ruling further.

This rule applies to all the waters at issue. Subject to Title 85, Chapter 2, Part 5, MCA, groundwater appropriated and used on State land should be treated no differently than surface waters appropriated and used on those lands. The Montana Constitution, Art. IX, sec. 3, Mont. Const. and the Water Use Act, section 85-2-102(14), MCA, make no distinction between groundwater and other water rights.

The Order of the Water Court is reversed, and the case remanded for the purpose of modifying the Powder River Final Decree in compliance with this Opinion.

L.C. Dullbranson
Justice

We concur:

J.B. Turney
Chief Justice

John Conway Harrison

[Signature]

John E. Shucky

William E. Hurd
Justices

Mr. Justice Frank B. Morrison, Jr. specially concurring:

The majority opinion recalls to mind the old Montanan who said, "A moose is a cow designed by a committee." Indeed, this moose must have been designed by a committee.

The only bright light which shines through this otherwise verbose and rambling epistle is the result. In that I concur.

The majority opinion contains a good deal of judicial chaff including a rather lengthy recital of irrelevant historical data surrounding passage of the Montana Water Use Act of 1973. This effort effectively obfuscates the issues while impressing the casual reader that scholarship is the cornerstone of the majority's pronouncement.

The issue in this case is quite simple and straight forward. At the time the federal government granted school lands to the state in trust for educational purposes, did the federal government include within the grant the right to develop water to achieve the educational purposes of the trust? If, as an incident of ownership, the state acquired, as appurtenant to the land, the right to develop water so that the purpose of the trust could be realized, then the state cannot alienate that property right in diminution of the trust res.

The majority opinion initially indicates that the educational purpose of the trust cannot be realized without an appurtenant water right. With this I agree. However, in an apparent attempt to avoid interrupting the priorities of other appropriators, the majority seems to be saying that this appurtenant right did not spring into existence until it was developed by the lessee. This approach recognizes the priority of appropriators. In order to accomplish this objective the majority has created a fictional agency whereby

the lessee, who develops the water, does so on behalf of the state. This nonsense is engaged to achieve a result.

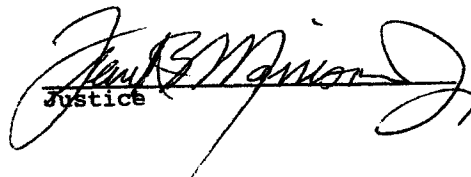
The majority's effort to secure unto school lands a sufficient amount of water to maximize their income potential for the trust, without disrupting prior rights, could have been achieved on a more legally sound foundation by simply holding that the federal government granted to the state school lands with the appurtenant right to develop water in order to maximize their income producing ability. The court then could have held that, under the prior appropriation doctrine, a priority date did not commence until the right was developed. In this way, at least, the majority would have recognized the property right in the state from the beginning which would give a basis for holding that the lessee developed the right for the state.

In truth, these school lands were withdrawn from the public domain prior to any appropriation. The federal government granted to the state, in trust for educational purposes, land and the water necessary to develop the land for its trust purposes. Later, when the public domain was settled appropriations were made but the appropriations only operated on those lands remaining in the public domain. Settlers who moved in and appropriated could have obtained no water from school lands which resided safely in the trust.

I find it unfortunate that reference is made to the "Winters Doctrine" or to federal reserved rights. Apparently there is some anticipation by the majority that this precedent will effect the adjudication of Indian water rights. Perhaps by analogy it will. However, those cases are not before us.

I concur in the result for the reason that, at the time of the creation of the school trust, the federal government

conveyed to the state, not only the land, but the appurtenant
right to develop water necessary for fulfillment of the trust
purpose. I specifically disavow the remainder of the
majority's opinion.


Justice

Senate Natural Resource Committee
Hearing on HB 286
Room 303. 3PM
March 18, 2019

Mr. Chairman and Members of the Committee:

My name is Jim Hagenbarth and our family grazes livestock on private, state and BLM lands in southwestern Montana around Glen. We have been leasing state land in this area for 77 years and currently have 9 state leases where we harvest 1238 AUMS on 7144 acres of state land that is intermingled with private and BLM lands that make up an 18,610 acre grazing complex. This is in a 4-9 inch annual precipitation zone with very little live water. In 1970 this grazing area was divided up into 7 units with water being the limiting factor dictating season of use and class of livestock. In 1983 with the help of the NRCS we began to develop water via a pipelines and storage to make reasonable use feasible. In 2016 we finally finished this complex and are just beginning to harvest the AUMS we have been charged for throughout the last 77 years. We have installed over 81,000 feet of pipe which services 17 troughs, 6 storage tanks and has a system storage capacity of 65,000 gallons. This system has been serviced by two pumps in sumps using ground water that rises in a spring that straddles a private-state property line. These sumps are located on deeded land and the 1983 water right is in our name. As we began to document the water use as we developed this system since 1983, the DNRC demanded that we put the State of Montana's name on this water right because the spring that supplies the ground water for the sumps rises on state and private land. Over the years we have purchased easements through state land for the entire mainline and have filed improvement applications that were approved for all other developments that go through state land. The DNRC did not pay one cent for any of the improvements we have made since 1983, yet they want their name on this water right. Over the years we have spent several hundred thousand dollars on this system so we could adequately use this range, including the state AUMs we have been charged for. Because of the algae in this spring we were losing our pumps every couple of years. We have recently added two additional points of diversion that are located on deeded land using wells rather than sumps to service the system. This improvement cost us about \$60,000 dollars over a three year period to complete, \$7200 of which went to consultants and water lawyers dealing with the DNRC. This system has been developed to the point that it only uses 20 gallons per minute and can water up to 2250 head of cattle. Without this water system and grazing unit development, the dry nature of the area would make it practically useless. State lessees' greatest contribution to the citizens of the state of Montana is the appreciation of value of the state land that is under their stewardship and management. One has to remember that the forage we harvest off state lands is on open space. In Montana it has been costing us over \$14 per AUM to provide and maintain the infrastructure necessary to responsibly harvest the forage from the grazing lands we manage. This cost is before an animal sets foot on it. Lessees contribute much more to the responsible management of state grazing land than the general

public recognizes. They are irreplaceable. The dialogue above is an attempt to demonstrate how much lessees really contribute.

HB 286 is an attempt by the author to recognize the value that state land lessees contribute to the school trust lands that they manage. It provides a mechanism where water from private sources can be temporarily used for stock water on state lands and is a function of the lessees' contribution and should not be subject to the onerous and predatory actions of the DNRC. The fact that water from private land can be temporarily used on state land without the state perfecting ownership of the source has clearly been settled by the Montana Water Court in Case No. 43A-A. The fact that the State of Montana has been bullying lessees into putting the State's name on private water sources is unacceptable under current legal precedence and needs to be put in law to stop this illegal and onerous action by the state. It is very troublesome that a state agency disregards current water court rulings when all water right holders in the state depend upon these rulings. Allowing the DNRC to continue this defiance of a Water Court ruling really weakens water rights in Montana and our ability to defend them. Our family supports HB 286. It can be very difficult and expensive to work with the state on these kinds of matters and this bill gives us guidance and relief. This bill has our full support.

Sincerely,

Jim Hagenbarth
PO Box 1128
Dillon, MT 59725
hagenbarthj@msn.com

MINUTES

MONTANA SENATE 66th LEGISLATURE - REGULAR SESSION COMMITTEE ON NATURAL RESOURCES

Call to Order: Chair Jeffrey W. Welborn, on April 3, 2019 at 2:52 PM, in Room 303 Capitol

ROLL CALL

Members Present:

Sen. Jeffrey W. Welborn, Chair (R)
Sen. JP Pomnichowski, Vice Chair (D)
Sen. Tom Richmond, Vice Chair (R)
Sen. Duane Ankney (R)
Sen. Dick Barrett (D)
Sen. Jill Cohenour (D)
Sen. John Esp (R)
Sen. Pat Flowers (D)
Sen. Bruce Gillespie (R)
Sen. Brian Hoven (R)
Sen. Tom Jacobson (D)

Members Excused: Sen. Scott Sales (R)

Members Absent: None

Staff Present: Jason Mohr, Legislative Branch
Mary Vandenbosch, Committee Secretary

Audio Committees: These minutes are in outline form only. They provide a list of participants and a record of official action taken by the committee. The link to the audio recording of the meeting is available on the Legislative Branch website.

Committee Business Summary:

Hearing & Date Posted: HB 341, 3/29/2019; HB 342, 3/29/2019

Executive Action: HB 34 - Be Concurred In
HB 286 - Be Concurred In as Amended

EXECUTIVE ACTION ON HB 34

14:53:19 **Motion:** Sen. Pomnichowski moved that **HB 34 BE CONCURRED IN.**

Discussion:

14:53:25 Chairman Welborn

14:53:34 Sen. Pomnichowski

14:53:49 Sen. Richmond entered the meeting.

14:54:07 Chairman Welborn

14:54:34 **Vote:** Motion carried unanimously by voice vote. Sen. S. Sales voted by proxy. Sen. Welborn will carry the bill.

EXECUTIVE ACTION ON HB 286

14:55:32 **Motion:** Sen. Richmond moved that **HB 286 BE CONCURRED IN.**

14:56:48 **Motion:** Sen. Richmond moved that **HB 286 BE AMENDED.**

EXHIBIT(nas69a01)

Discussion:

14:57:17 Sen. Barrett

14:57:24 Sen. Richmond

14:57:45 Sen. Cohenour

14:57:52 Jason Mohr, Legislative Services Division (LSD)

14:59:02 Sen. Gillespie

14:59:32 Mr. Mohr, LSD

15:00:00 Sen. Gillespie

15:00:20 Mr. Mohr

15:00:42 Sen. Barrett

15:01:27 Mr. Mohr

15:01:49 Sen. Esp

15:02:15 Sen. Pomnichowski

15:04:48 Sen. Barrett

15:05:11 Rep. Redfield

15:05:22 Sen. Cohenour left the hearing.

15:06:05 Sen. Pomnichowski

15:07:34 Sen. Ankney

15:08:00 Sen. Flowers

15:08:24 Mr. Mohr

15:08:54 Sen. Flowers

15:09:04 Mr. Mohr

15:09:12 Sen. Esp

15:09:41 **Vote:** Motion carried 7-5 by roll call vote with Sen. Barrett, Sen. Cohenour, Sen. Flowers, Sen. Jacobson and Sen. Pomnichowski voting no. Sen. Cohenour and Sen. S. Sales voted by proxy.

15:10:30 **Motion:** Sen. Richmond moved that **HB 286 BE CONCURRED IN AS AMENDED.**

Discussion:

15:10:36 Chairman Welborn

15:10:49 Sen. Pomnichowski

15:10:56 **Vote:** Motion carried 8-4 by roll call vote with Sen. Barrett, Sen. Cohenour, Sen. Flowers and Sen. Pomnichowski voting no. Sen. Cohenour and Sen. S. Sales voted by proxy. Sen. Esp will carry the bill.

HEARING ON HB 341

Opening Statement by Sponsor:

15:12:32 Rep. Bob Brown (R), HD 13, opened the hearing on HB 341, Create GWIP special revenue account.

Proponents' Testimony:

15:15:06 Abigail St. Lawrence, Montana Building Industry Association; Montana Trout Unlimited

15:16:02 Krista Lee Evans, Senior Water Rights Coalition; Association of Gallatin Agricultural Irrigators

15:16:55 Chelcie Cargill, Montana Farm Bureau Federation; Montana Stockgrowers Association

15:18:26 Mike Murphy, Montana Water Resources Association

15:19:09 Ronda Wiggers, Montana Water Well Drillers; Montana Mining Association

Opponents' Testimony: None

Informational Testimony:

15:20:18 John Metesh, Montana Bureau of Mines and Geology (MBMG)

Questions from Committee Members and Responses:

15:20:50 Sen. Hoven

15:21:36 Mr. Metesh, MBMG

15:23:48 Sen. Pomnichowski

15:24:30 Mr. Metesh

15:25:21 Sen. Barrett

15:25:54 Mr. Metesh

15:27:02 Sen. Richmond

15:27:35 Mr. Metesh

15:31:13 Sen. Cohenour returned to the meeting.

15:32:21 Sen. Gillespie

15:33:00 Mr. Metesh

15:34:32 Sen. Esp
 15:34:49 Mr. Metesh
 15:34:56 Sen. Hoven
 15:35:09 Mr. Metesh
 15:35:24 Sen. Pomnichowski
 15:35:59 Mr. Metesh
 15:36:12 Chairman Welborn
 15:36:30 Sen. Esp

Closing by Sponsor:

15:36:58 Rep. Brown

HEARING ON HB 342

Opening Statement by Sponsor:

15:38:45 Rep. Bob Brown (R), HD 13, opened the hearing on HB 342, Create SWAMP special revenue account.

Proponents' Testimony:

15:39:52 Abigail St. Lawrence, Montana Building Association; Montana Trout Unlimited
 15:42:50 Krista Lee Evans, Senior Water Rights Coalition (SrWRC), Association of Gallatin Agricultural Irrigators (AGAI)
 15:45:39 Chelcie Cargill, Montana Farm Bureau Federation
 15:46:25 Mike Murphy, Montana Water Resources Association

Opponents' Testimony: None

Informational Testimony:

15:47:33 John Metesh, Montana Bureau of Mines and Geology (MBMG)

Questions from Committee Members and Responses:

15:47:55 Sen. Hoven
 15:48:45 Mr. Metesh, MBMG
 15:53:21 Sen. Cohenour
 15:53:50 Ms. Evans, SrWRC; AGAI
 15:55:27 Sen. Pomnichowski
 15:55:52 Mr. Metesh
 16:01:27 Sen. Flowers
 16:01:57 Rep. Brown
 16:05:43 Mr. Metesh
 16:07:29 Sen. Flowers
 16:08:33 Mr. Metesh
 16:09:52 Sen. Barrett
 16:10:11 Sen. Cohenour
 16:11:14 Rep. Brown

Closing by Sponsor:

16:14:32 Rep. Brown

Committee Business:

16:15:31 Chairman Welborn

16:16:05 Sen. Esp

ADJOURNMENT

Adjournment: 4:17 PM

Mary Vandenbosch, Secretary

mv

Additional Documents:

EXHIBIT([nas69aad.pdf](#))

66th LEGISLATURE 2019 SESSION

Additional Documents

Business Page

Roll Call

**Standing Committee
Reports**

Table Bills

Fiscal reports

Tabled Bills

Roll Call Votes

Proxies

Witness Statements

Informational items

Visitor Registrations

**Any Document or
material presented
after the meeting for
example@ petitions,
news clippings ectara.**

BUSINESS REPORT

**MONTANA SENATE
66th LEGISLATURE - REGULAR SESSION**

SENATE NATURAL RESOURCES COMMITTEE

Date: Wednesday, April 3, 2019

Place: Capitol

Time: 2:52 PM

Room: 303

BILLS and RESOLUTIONS HEARD:

HB 341 - Create GWIP special revenue account - Rep. Bob Brown (R)

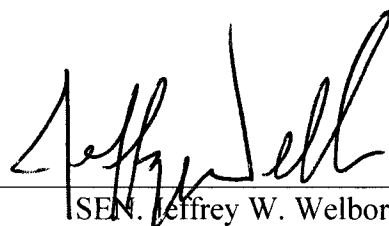
HB 342 - Create SWAMP special revenue account - Rep. Bob Brown (R)

EXECUTIVE ACTION TAKEN:

HB 34 - Be Concurred In

HB 286 - Be Concurred In as Amended

Comments:

A handwritten signature in black ink, appearing to read "Jeffrey W. Welborn", is written over a horizontal line.

SEN. Jeffrey W. Welborn, Chair

MONTANA STATE SENATE
Roll Call
NATURAL RESOURCES COMMITTEE

DATE: 4-3-2019

<u>NAME</u>	<u>PRESENT</u>	<u>ABSENT/ EXCUSED</u>
VICE CHAIR TOM RICHMOND		✓
VICE CHAIR JP POMNICHOWSKI	✓	
SENATOR DUANE ANKNEY	✓	
SENATOR DICK BARRETT	✓	
SENATOR BRUCE GILLESPIE	✓	
SENATOR PAT FLOWERS	✓	
SENATOR JOHN ESP	✓	
SENATOR TOM JACOBSON	✓	
SENATOR BRIAN HOVEN	✓	
SENATOR JILL COHENOUR	✓	
SENATOR SCOTT SALES		✓
CHAIRMAN JEFFREY WELBORN	✓	



SENATE STANDING COMMITTEE REPORT

April 3, 2019

Page 1 of 1

Mr. President:

We, your committee on **Natural Resources** report that **House Bill 34** (third reading copy -- blue) **be concurred in.**

Signed: _____

Jeffrey W. Welborn
Senator Jeffrey W. Welborn, Chair

To be carried by Senator Jeffrey Welborn

- END -

Committee Vote:

Yes 12, No 0

Fiscal Note Required X

HB0034001SC13700.slk



SENATE STANDING COMMITTEE REPORT

April 3, 2019

Page 1 of 2

Mr. President:

We, your committee on **Natural Resources** report that **House Bill 286** (third reading copy -- blue) be concurred in as amended.

Signed: _____

Jeffrey W. Welborn
Senator Jeffrey W. Welborn, Chair

To be carried by Senator John Esp

And, that such amendments read:

1. Page 2, line 18 through line 27.

Strike: subsection (2) through subsection (3) in their entirety

Insert: "(2) The state may not obtain an ownership interest in a water right or the ground water development works of a water right that is diverted from a well or developed spring located on private land exclusively based on trustee obligations for state trust land unless:

(a) a court of competent jurisdiction determines that the state is an owner of that particular water right; or

(b) the state is in possession of a deed transferring ownership of the water right to the state."

Renumber: subsequent subsections

2. Page 2, line 28.

Following: "acquired"

Insert: "to satisfy trustee obligations for state trust land"

3. Page 2, line 29 through line 30.

Strike: "to satisfy" on line 29 through "land" on line 30

Strike: "subsections (2) or (3)" on line 30

Insert: "subsection (2)"

Committee Vote:

Yes 8, No 4

Fiscal Note Required X

- END -

MONTANA STATE SENATE
Roll Call Vote
NATURAL RESOURCES COMMITTEE

DATE 4-3-2019 BILL NO HB286 MOTION NO. _____
MOTION: Be Amended (HB026603.AJm)

<u>NAME</u>	<u>AYE</u>	<u>NO</u>	If Proxy Vote, check here & include signed Proxy Form with minutes
VICE CHAIR TOM RICHMOND	✓		
VICE CHAIR JP POMNICHOWSKI		✓	
SENATOR DUANE ANKNEY	✓		
SENATOR DICK BARRETT		✓	
SENATOR BRUCE GILLESPIE	✓		
SENATOR PAT FLOWERS		✓	
SENATOR JOHN ESP	✓		
SENATOR TOM JACOBSON		✓	
SENATOR BRIAN HOVEN	✓		
SENATOR JILL COHENOUR		✓	✓
SENATOR SCOTT SALES	✓		✓
CHAIRMAN JEFFREY WELBORN	✓		
12 members TOTAL:	7	5	

MONTANA STATE SENATE
Roll Call Vote
NATURAL RESOURCES COMMITTEE

DATE 4-3-2019 BILL NO HB 286 MOTION NO. _____
MOTION: HB 286 Be Concurred In as Amended

NAME	AYE	NO	If Proxy Vote, check here & include signed Proxy Form with minutes
VICE CHAIR TOM RICHMOND	✓		
VICE CHAIR JP POMNICHOWSKI		✓	
SENATOR DUANE ANKNEY	✓		
SENATOR DICK BARRETT		✓	
SENATOR BRUCE GILLESPIE	✓		
SENATOR PAT FLOWERS		✓	
SENATOR JOHN ESP	✓		
SENATOR TOM JACOBSON	✓		
SENATOR BRIAN HOVEN	✓		
SENATOR JILL COHENOUR		✓	✓
SENATOR SCOTT SALES	✓		✓
CHAIRMAN JEFFREY WELBORN	✓		
12 members TOTAL:	8	4	

SENATE PROXY

I, Senator Jill Abernethy, hereby authorize Senator

JP Formichoneski to vote my proxy before the Senate

Senate Natural Resources meeting held on 3 April, 2019.



Senator Signature

1/9/19

Date

Said authorization is as follows: *(mark only one)*

- ☒ All votes, including amendments.
- ☐ All votes as directed below on the listed bills, and all other votes.
- ☐ Votes only as directed below.

[illegible]

SENATE PROXY

I, Senator SCOTT SALES, hereby authorize Senator
WELBORN to vote my proxy before the Senate
NATURAL RESOURCES meeting held on APRIL 3, 2019.



Senator Signature

4-3-2019
Date

Said authorization is as follows: *(mark only one)*

- ☒ All votes, including amendments.
- ☐ All votes as directed below on the listed bills, and all other votes.
- ☐ Votes only as directed below.

[illegible]

SENATE NATURAL RESOURCES COMMITTEE

Sponsor: **Rep. Bob Brown (R)**

[illegible]

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

SENATE NATURAL RESOURCES COMMITTEE

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

Amendments to House Bill No. 286
3rd Reading Copy

Requested by Representative Alan Redfield

For the Senate Natural Resources Committee

Prepared by Jason Mohr
April 1, 2019 (12:31pm)

1. Page 2, line 18 through line 27.

Strike: subsection (2) through subsection (3) in their entirety

Insert: "(2) The state may not obtain an ownership interest in a water right or the ground water development works of a water right that is diverted from a well or developed spring located on private land exclusively based on trustee obligations for state trust land unless:

(a) a court of competent jurisdiction determines that the state is an owner of that particular water right; or

(b) the state is in possession of a deed transferring ownership of the water right to the state."

Renumber: subsequent subsections

2. Page 2, line 28.

Following: "acquired"

Insert: "to satisfy trustee obligations for state trust land"

3. Page 2, line 29 through line 30.

Strike: "to satisfy" on line 29 through "land" on line 30

Strike: "subsections (2) or (3)" on line 30

Insert: "subsection (2)"

- END -

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 66th LEGISLATURE - REGULAR SESSION

COMMITTEE ON APPROPRIATIONS

Call to Order: Chair Carl Glimm, on April 11, 2019 at 3:00 P.M., in Room 102 Capitol

ROLL CALL

Members Present:

Rep. Carl Glimm, Chair (R)
Rep. Ryan Lynch, Vice Chair (D)
Rep. David Bedey (R)
Rep. Mary Caferro (D)
Rep. Jim Hamilton (D)
Rep. Bradley Hamlett (D)
Rep. Kenneth L. Holmlund (R)
Rep. Jim Keane (D)
Rep. Joe Read (R)
Rep. Matt Regier (R)
Rep. Marilyn Ryan (D)
Rep. Jonathan Windy Boy (D)
Rep. Tom Woods (D)

Members Excused:

Rep. Nancy Ballance, Chair (R)
Rep. Dan Bartel, Vice Chair (R)
Rep. Llew Jones, Vice Chair (R)
Rep. Tom Burnett (R)
Rep. Kimberly Dudik (D)
Rep. Mike Hopkins (R)
Rep. Bill Mercer (R)
Rep. Frederick (Eric) Moore (R)
Rep. Rae Peppers (D)

Members Absent: None

Staff Present: Julie Johnson, Legislative Branch
Jessica Riffel, Committee Clerk
Joe Triem, Legislative Branch

Audio Committees: These minutes are in outline form only. They provide a list of participants and a record of official action taken by the committee. The link to the audio recording of the meeting is available on the Legislative Branch website.

Committee Business Summary:

Hearing & Date Posted: HB 286, 4/10/2019; SB 30, 4/10/2019
Executive Action: SB 30

HEARING ON HB 286**Opening Statement by Sponsor:**

15:10:03 Rep. Alan Redfield (R), HD 59, opened the hearing on HB 286, Revise water right laws related to state water claims.

15:10:18 Rep. E. Moore and Rep. Dudik joined the meeting. Rep. Regier left the meeting.

Proponents' Testimony:

15:10:34 Krista Lee Evans, Senior Water Rights Coalition AGIE

15:11:28 Liv Stavick, Montana Farm Bureau Federation (MFBF)

15:11:51 Mike Murphy, Montana Water Resources Association (MWRA)

15:12:17 Jay Bodner, Montana Stockgrowers Association (MSGA)

Opponents' Testimony:

15:12:44 John Tubbs, Director, Department of Natural Resources and Conservation (DNRC)

15:13:20 Rep. Peppers joined the meeting.

Informational Testimony: None**Questions from Committee Members and Responses:**

15:15:24 Rep. Hamlett

15:18:46 Director Tubbs, DNRC

15:18:56 Chair Ballance and Vice Chair Jones joined the meeting.

15:19:43 Rep. Woods

15:22:00 Director Tubbs, DNRC

15:22:39 Rep. Hamlett

15:23:24 Director Tubbs, DNRC

Closing by Sponsor:

15:25:30 Rep. Redfield

15:26:34 Recessed

15:33:10 Reconvened with Rep. Windy Boy and Rep. Hamilton excused.

HEARING ON SB 30**Opening Statement by Sponsor:**

15:33:20 Rep. Mary Caferro (D), HD 81, opened the hearing on SB 30, Allowing peer support services to be reimbursed under Medicaid.

*Note: With written permission, Rep. Caferro presented SB 30 on Sen. Gross' behalf.

Proponents' Testimony:

15:35:44 Colleen Rahn, National Alliance on Mental Illness of Montana (NAMI-MT)

15:36:49 Quinton Schroeter, National Alliance on Mental Illness of Montana (NAMI-MT)

15:40:39 Jordan Thompson, Confederated Salish and Kootenai Tribe (CSKT)

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses: None

Closing by Sponsor:

15:41:59 Rep. Caferro

Committee Business:

15:42:37 Rep. Jones

15:42:42 Chair Glimm

15:42:56 Rep. Jones

EXECUTIVE ACTION ON SB 30

15:43:20 **Motion:** Rep. Jones moved that **SB 30 BE CONCURRED IN.**

15:43:35 **Motion:** Rep. Bedey moved that **SB 30 BE AMENDED.**

[EXHIBIT](#)(aph76a01)

Discussion:

15:43:50 Rep. Bedey

15:44:50 Rep. Caferro

15:45:09 Chair Glimm

15:45:23 Rep. Bedey

15:45:32 Rep. Caferro

15:46:29 Rep. Bedey

15:47:02 **Vote:** Motion carried unanimously by voice vote. Rep. Bartel, Rep. Burnett, Rep. Hamilton, Rep. Hopkins, Rep. Mercer, Rep. M. Regier and Rep. Windy Boy voted by proxy.

15:47:37 **Motion/Vote:** Rep. Jones moved that **SB 30 BE CONCURRED IN AS AMENDED.** Motion carried 16-4 by voice vote with Rep. Bartel, Rep. Glimm, Rep. Mercer and Rep. M. Regier voting no. Rep. Bartel, Rep. Hamilton, Rep. Mercer, Rep. M. Regier and Rep. Windy Boy voted by proxy. Rep. Burnett and Rep. Hopkins were excused. Rep. Kelker will carry the bill.

15:48:41 Chair Glimm

ADJOURNMENT

Adjournment: 15:49:09

Jessica Riffel, Clerk

jr

Additional Documents:

EXHIBIT([aph76aad.pdf](#))

66th LEGISLATURE 2019 SESSION

Additional Documents

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Any Document or
material presented
after the meeting for
example@ petitions,
news clippings ectara.

Fiscal reports

Tabled Bills

Roll Call Votes

BUSINESS REPORT

**MONTANA HOUSE OF REPRESENTATIVES
66th LEGISLATURE - REGULAR SESSION**

HOUSE APPROPRIATIONS COMMITTEE

Date: Thursday, April 11, 2019

Place: Capitol

Time: 3:00 P.M.

Room: 102

BILLS and RESOLUTIONS HEARD:

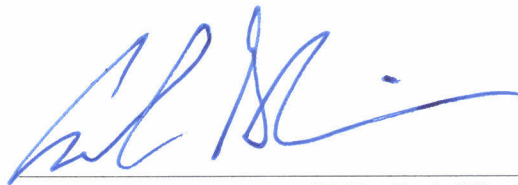
HB 286 - Revise water right laws related to state water claims - Rep. Alan Redfield (R)

SB 30 - Allowing peer support services to be reimbursed under Medicaid - Sen. Jen Gross (D)

EXECUTIVE ACTION TAKEN:

SB 30 - Be Concurred In As Amended

Comments:



REP. Carl Glimm, Chair



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

APPROPRIATIONS COMMITTEE

ROLL CALL

DATE: 4/11/19

NAME	PRESENT	ABSENT/EXCUSED
REP. BALLANCE, CHAIR		X
REP. GLIMM, CHAIR	X	
REP. BARTEL, VICE CHAIR		X
REP. JONES, VICE CHAIR		X
REP. LYNCH, VICE CHAIR	X	
REP. BEDEY	X	
REP. BURNETT		X
REP. CAFERRO	X	
REP. DUDIK		X
REP. HAMILTON	X	
REP. HAMLETT	X	
REP. HOLMLUND	X	
REP. HOPKINS		X
REP. KEANE	X	
REP. MERCER		X
REP. ERIC MOORE		X
REP. PEPPERS		X
REP. READ	X	
REP. REGIER	X	
REP. RYAN	X	
REP. WINDY BOY	X	
REP. WOODS	X	

22 MEMBERS



HOUSE STANDING COMMITTEE REPORT

April 11, 2019

Page 1 of 1

Mr. Speaker:

We, your committee on **Appropriations** recommend that **Senate Bill 30** (second house second reading copy -- tan) **be concurred in as amended.**

Signed:


Representative Carl Glimm, Chair

To be carried by Representative Kathy Kelker

And, that such amendments read:

1. Page 4, line 27.

Strike: "SUBJECT" through "THE"

Insert: "The"

2. Page 5, line 8 through line 9.

Strike: subsection (c) in its entirety

3. Page 5, line 23.

Following: "APPROPRIATED"

Insert: "for the biennium beginning July 1, 2019, on a one-time-only basis,"

- END -

Committee Vote:

Yes 16, No 4

Fiscal Note Required X

SB0030002SC16507.hlc

9/13 2/13
4-12
P16.19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Glimm.

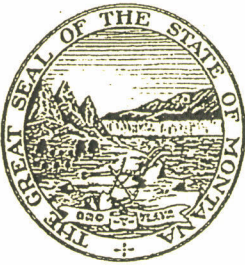
BILL	AYE	NO
SB003004.ASO	X	
SB30 Concur As Amend		X

BILL	AYE	NO

I authorize my vote to be matched with that of Rep. Glimm
for any amendments proposed on this date.

Rep. Dan Bartel Dan Bartel
(Signature)

Date 4/11/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Glimm.

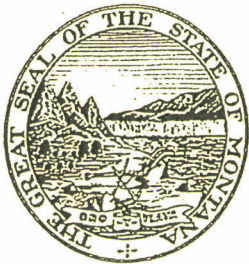
BILL	AYE	NO
SB003004. A50	X	
SB30 concur as Amend		X

BILL	AYE	NO

I authorize my vote to be matched with that of Rep. Glimm
for any amendments proposed on this date.

Rep. 
(Signature)
MERCER

Date 4/11/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Glimm.

BILL	AYE	NO
SB603004. ASO	X	
SB 30 Concur As Amended		X

BILL	AYE	NO

I authorize my vote to be matched with that of Rep. Glimm
for any amendments proposed on this date.

Rep. Miss Rios
(Signature)

Date 4/11/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Approps Committee.

I desire to leave my proxy vote with Rep. Lynch.

Directions: Please include **bill number** and **motion or amendment number**.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO	BILL/AMENDMENT	AYE	NO
SB 30	X				
SB003004. ASO	X				

I authorize my vote to be matched with that of Rep. Lynch
for any amendments proposed on this date.

Rep. [Signature]
(Signature)

Date 4/11/19

Hamilton



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Approps Committee.

I desire to leave my proxy vote with Rep. Lynch.

Directions: Please include **bill number** and **motion or amendment number**.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO
SB 30	X	
SB003004.A50	X	

BILL/AMENDMENT	AYE	NO

I authorize my vote to be matched with that of Rep. Lynch
for any amendments proposed on this date.

Rep. [Signature]
(Signature)

Date 4-11-19

Windy Boy



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Ballance.

Directions: Please include **bill number** and **motion** or **amendment number**.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO
SB003009.A50	X	

BILL/AMENDMENT	AYE	NO

I authorize my vote to be matched with that of Rep. Ballance
for any amendments proposed on this date.

Rep. Bob Burnett
Burnett (Signature)

Date 4/11/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Ballance.

Directions: Please include **bill number** and **motion or amendment number**.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO	BILL/AMENDMENT	AYE	NO
SB003004.Aso	X				

I authorize my vote to be matched with that of Rep. Ballance
for any amendments proposed on this date.

Rep. MIT
(Signature)

Date 4/11/19

MONTANA House of Representatives
Visitors Register
HOUSE APPROPRIATIONS COMMITTEE

Thursday, April 11, 2019

HB 286 - Revise water right laws related to state water claims

Sponsor: Rep. Alan Redfield (R)

PLEASE PRINT

[illegible]

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

**MONTANA House of Representatives
Visitors Register
HOUSE APPROPRIATIONS COMMITTEE**

Thursday, April 11, 2019

SB 30 - Allowing peer support services to be reimbursed under Medicaid

Sponsor: **Sen. Jen Gross (D)**

PLEASE PRINT

[illegible]

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.



ADDITIONAL DOCUMENTS

MONTANA STATE SENATE

I, Senator Jen Gross,
grant Rep. Caferro
permission to
present SB 30
on my behalf.

Jen Gross
4/11/19

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 66th LEGISLATURE - REGULAR SESSION

COMMITTEE ON APPROPRIATIONS

Call to Order: Chair Carl Glimm, on April 12, 2019 at 10:00 A.M., in Room 102 Capitol

ROLL CALL

Members Present:

Rep. Carl Glimm, Chair (R)
Rep. Nancy Ballance, Chair (R)
Rep. Ryan Lynch, Vice Chair (D)
Rep. David Bedey (R)
Rep. Tom Burnett (R)
Rep. Kimberly Dudik (D)
Rep. Jim Hamilton (D)
Rep. Bradley Hamlett (D)
Rep. Kenneth L. Holmlund (R)
Rep. Jim Keane (D)
Rep. Frederick (Eric) Moore (R)
Rep. Rae Peppers (D)
Rep. Joe Read (R)
Rep. Marilyn Ryan (D)
Rep. Tom Woods (D)

Members Excused:

Rep. Dan Bartel, Vice Chair (R)
Rep. Llew Jones, Vice Chair (R)
Rep. Mary Caferro (D)
Rep. Mike Hopkins (R)
Rep. Bill Mercer (R)
Rep. Matt Regier (R)
Rep. Jonathan Windy Boy (D)

Members Absent: None

Staff Present: Julie Johnson, Legislative Branch
Jessica Riffel, Committee Clerk
Joe Triem, Legislative Branch

Audio Committees: These minutes are in outline form only. They provide a list of participants and a record of official action taken by the committee. The link to the audio recording of the meeting is available on the Legislative Branch website.

Committee Business Summary:

Hearing & Date Posted: SB 330, 4/11/2019; SB 358, 4/11/2019
Executive Action: HB 286, SB 330, SB 358

10:05:00 Rep. Caferro joined the meeting.

HEARING ON SB 358

Opening Statement by Sponsor:

10:05:22 Sen. Terry Gauthier (R), SD 40, opened the hearing on SB 358, Revise resort area alcoholic beverage license laws.

Proponents' Testimony:

10:06:48 John Iverson, Montana Tavern Association (MTA)

10:07:12 Mark Taylor, Moonlight Basin, Spanish Peaks

Opponents' Testimony: None

Informational Testimony:

10:07:51 Becky Schlauch, Department of Revenue (DOR)

Questions from Committee Members and Responses:

10:08:13 Chair Ballance

10:08:49 Mark Taylor, Moonlight Basin, Spanish Peaks

10:09:10 Rep. Hamilton

10:10:29 Sen. Gauthier

10:10:39 John Iverson, MTA

10:10:50 Vice Chair Jones joined the meeting.

10:11:19 Rep. Hamilton

10:12:34 John Iverson, MTA

10:13:01 Rep. Hamlett

10:14:02 Mark Taylor, Moonlight Basin, Spanish Peaks

10:14:27 Rep. Caferro

10:19:15 John Iverson, MTA

10:19:51 Rep. Ryan

10:21:02 Sen. Gauthier

10:21:41 John Iverson, MTA

10:23:24 Rep. Ryan

10:23:53 John Iverson, MTA

10:25:21 Rep. Burnett

10:25:50 Becky Schlauch, DOR

10:26:47 Rep. Woods

10:28:39 Mark Taylor, Moonlight Basin, Spanish Peaks

10:29:05 Rep. Woods

10:30:01 Sen. Gauthier

10:30:15 Rep. Woods

10:32:02 John Iverson, MTA

10:33:39 Rep. Hamlett

10:35:15 John Iverson, MTA

10:35:26 Chair Ballance

10:36:20 John Iverson, MTA

10:37:04 Rep. Hamilton

10:40:12 Becky Schlauch, DOR

Closing by Sponsor:

10:40:45 Sen. Gauthier

HEARING ON SB 330**Opening Statement by Sponsor:**

10:41:06 Sen. Mark Blasdel (R), SD 4, opened the hearing on SB 330, Authorize sports gambling act.

Proponents' Testimony:

10:43:14 Ronda Wiggers, Montana Coin Machine Operators Association (MCMOA)

10:45:55 John Iverson, Montana Tavern Association (MTA)

Opponents' Testimony: None**Informational Testimony:**

10:46:37 Angela Nunn, Department of Justice (DOJ)

Questions from Committee Members and Responses:

10:48:14 Rep. Keane

10:52:18 Angela Nunn, DOJ

10:53:11 Rep. Keane

10:54:30 Sen. Blasdel

10:54:54 Rep. Caferro

10:57:37 Sen. Blasdel

10:57:51 Rep. E. Moore left the meeting.

10:58:23 Rep. Bedey

11:01:14 Sen. Blasdel

11:01:43 Rep. Hamilton

11:06:03 Angela Nunn, DOJ

11:06:49 Rep. Peppers

11:07:33 Sen. Blasdel

11:08:44 Rep. Peppers

11:08:59 Sen. Blasdel

11:09:04 Angela Nunn, DOJ

Closing by Sponsor:

11:09:46 Sen. Blasdel

11:11:03 Recessed

11:24:22 Reconvened

EXECUTIVE ACTION ON HB 286

11:24:45 **Motion/Vote:** Rep. Jones moved that **HB 286 DO PASS**. Motion carried 20-2 by voice vote with Rep. Dudik and Rep. Ryan voting no. Rep. Bartel, Rep. Hopkins, Rep. Mercer, Rep. E. Moore, Rep. M. Regier and Rep. Windy Boy voted by proxy.

EXECUTIVE ACTION ON SB 330

11:25:53 **Motion/Vote:** Rep. Jones moved that **SB 330 BE CONCURRED IN**. Motion carried 18-4 by voice vote with Rep. Burnett, Rep. Hamilton, Rep. Mercer and Rep. Woods voting no. Rep. Bartel, Rep. Hopkins, Rep. Mercer, Rep. E. Moore, Rep. M. Regier and Rep. Windy Boy voted by proxy. Rep. Lynch will carry the bill.

*Note: Rep. Peppers requested her vote be changed to "No" vote at the end of the meeting. Motion was without objection.

EXECUTIVE ACTION ON SB 358

11:27:10 **Motion:** Rep. Jones moved that **SB 358 BE CONCURRED IN**.

Discussion:

11:27:18 Rep. Hamilton

11:27:31 **Motion:** Rep. Hamilton moved that **SB 358 BE CONCEPTUALLY AMENDED TO STRIKE ITEM C ON PAGE 3, LINE 3**.

Discussion:

11:27:47 Rep. Hamilton

11:28:21 Chair Glimm

11:28:33 Rep. Hamilton

11:28:58 **Vote:** Motion failed 11-11 by roll call vote with Rep. Burnett, Rep. Caferro, Rep. Dudik, Rep. Hamilton, Rep. Hamlett, Rep. Keane, Rep. Lynch, Rep. Peppers, Rep. Ryan, Rep. Windy Boy and Rep. Woods voting aye. Rep. Bartel, Rep. Hopkins, Rep. Mercer, Rep. E. Moore, Rep. M. Regier and Rep. Windy Boy voted by proxy.

11:30:13 **Motion:** Rep. Hamilton moved that **SB 358 BE CONCEPTUALLY AMENDED TO CHANGE \$100,000 TO \$150,000 ON PAGE 17, LINE 12**.

Discussion:

11:30:24 Rep. Hamilton

11:31:44 Chair Ballance

11:31:57 Rep. E. Moore returned to the meeting.

11:32:42 Rep. Hamilton

11:33:26 **Vote:** Motion failed 10-12 by roll call vote with Rep. Caferro, Rep. Dudik, Rep. Hamilton, Rep. Hamlett, Rep. Keane, Rep. Lynch, Rep. Peppers, Rep. Ryan, Rep. Windy Boy and Rep. Woods voting aye. Rep. Bartel, Rep. Hopkins, Rep. Mercer, Rep. M. Regier and Rep. Windy Boy voted by proxy.

11:34:39 **Vote:** Motion carried 14-8 by roll call vote with Rep. Burnett, Rep. Caferro, Rep. Hamilton, Rep. Mercer, Rep. Peppers, Rep. Ryan, Rep. Windy Boy and Rep. Woods voting no. Rep. Bartel, Rep. Hopkins, Rep. Mercer, Rep. M. Regier and Rep. Windy Boy voted by proxy. Rep. Buttrey will carry the bill.

Committee Business:

11:36:06	Rep. Dudik
11:36:37	Rep. Peppers
11:37:00	Rep. Caferro
11:38:00	Chair Glimm
11:38:39	Rep. Caferro

ADJOURNMENT

Adjournment: 11:38:53

Jessica Riffel, Clerk

jr

Additional Documents:

EXHIBIT([aph77aad.pdf](#))

66th LEGISLATURE 2019 SESSION

Additional Documents

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BUSINESS REPORT

**MONTANA HOUSE OF REPRESENTATIVES
66th LEGISLATURE - REGULAR SESSION**

HOUSE APPROPRIATIONS COMMITTEE

Date: Friday, April 12, 2019

Place: Capitol

Time: 10:00 A.M.

Room: 102

BILLS and RESOLUTIONS HEARD:

SB 330 - Authorize sports gambling act - Sen. Mark Blasdel (R)

SB 358 - Revise resort area alcoholic beverage license laws - Sen. Terry Gauthier (R)

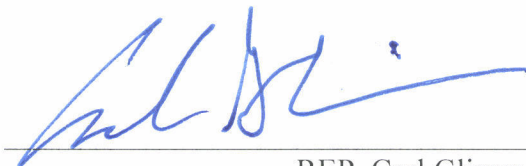
EXECUTIVE ACTION TAKEN:

HB 286 - Do Pass

SB 330 - Be Concurred In

SB 358 - Be Concurred In

Comments:



REP. Carl Glimm, Chair



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

APPROPRIATIONS COMMITTEE

ROLL CALL

DATE: 4/12/19

NAME	PRESENT	ABSENT/EXCUSED
REP. BALLANCE, CHAIR	X	
REP. GLIMM, CHAIR	X	
REP. BARTEL, VICE CHAIR		X
REP. JONES, VICE CHAIR		X
REP. LYNCH, VICE CHAIR	X	
REP. BEDEY	X	
REP. BURNETT	X	
REP. CAFERRO		X
REP. DUDIK	X	
REP. HAMILTON	X	
REP. HAMLETT	X	
REP. HOLMLUND	X	
REP. HOPKINS		X
REP. KEANE	X	
REP. MERCER		X
REP. ERIC MOORE	X	
REP. PEPPERS	X	
REP. READ	X	
REP. REGIER		X
REP. RYAN	X	
REP. WINDY BOY		X
REP. WOODS	X	

22 MEMBERS



HOUSE STANDING COMMITTEE REPORT

April 12, 2019

Page 1 of 1

Mr. Speaker:

We, your committee on **Appropriations** recommend that **House Bill 286** (first reading copy -- white) **do pass**.

Signed: _____

Representative Carl Glimm, Chair

- END -

Committee Vote:

Yes 20, No 2

Fiscal Note Required X

HB0286002SC.hlc

101
J83
4.12
17131



HOUSE STANDING COMMITTEE REPORT

April 12, 2019

Page 1 of 1

Mr. Speaker:

We, your committee on **Appropriations** recommend that **Senate Bill 330** (second house second reading copy -- tan) **be concurred in.**

Signed: _____

Representative Carl Glimm, Chair

To be carried by Representative Ryan Lynch

- END -

Committee Vote:

Yes 18, No 4

Fiscal Note Required X

SB0330003SC15256.h1c

1:03 4/12
J3
3.22



HOUSE STANDING COMMITTEE REPORT

April 12, 2019

Page 1 of 1

Mr. Speaker:

We, your committee on **Appropriations** recommend that **Senate Bill 358** (second house second reading copy -- tan) **be concurred in**.

Signed: _____

Representative Carl Glimm, Chair

To be carried by Representative Edward Buttrey

- END -

Committee Vote:

Yes 14, No 8

Fiscal Note Required X

SB0358003SC12545.hlc

1:03 J3
4:12
P 3:28



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Balla.

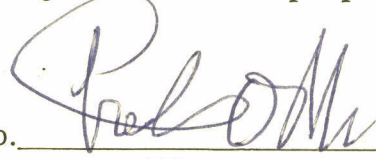
Directions: Please include **bill number** and **motion** or **amendment number**.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO
HB 286 Do Pass	X	
SB 330 BCI	X	
Conceptual #1		X
Conceptual #2		

BILL/AMENDMENT	AYE	NO

I authorize my vote to be matched with that of Rep. Balla
for any amendments proposed on this date.

Rep. 
(Signature)

Date 4/12/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Ballance.

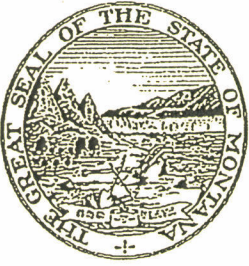
BILL	AYE	NO
HB 286 Do Pass	X	
SB 330 BCI	X	
Conceptual #1 ^{SB358}		X
Conceptual #2 ^{SB358}		X
SB358 BCI	X	

BILL	AYE	NO

I authorize my vote to be matched with that of Rep. _____
for any amendments proposed on this date.

Rep. Dan Bartel Dan Bartel
(Signature)

Date 4/12/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Ballance.

Directions: Please include **bill number** and **motion** or **amendment number**.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO
HB 286 Do Pass	X	
SB 330 BCI	X	
Conceptual #1 ^{SB 358}		X
Conceptual #2 ^{SB 358}		X
SB 358 BCI	X	

BILL/AMENDMENT	AYE	NO

I authorize my vote to be matched with that of Rep. _____
for any amendments proposed on this date.

Rep. MH
Hopkins (Signature)

Date 4/12/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Ballance.

Directions: Please include **bill number** and **motion** or **amendment number**.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO
HB 286 Do Pass	X	
SB 330 BCI		X
Conceptual #1 ³⁵⁸		X
Conceptual #2 ³⁵⁸		X
SB 358 BCI		X

BILL/AMENDMENT	AYE	NO

I authorize my vote to be matched with that of Rep. _____
for any amendments proposed on this date.

Rep. Ron Mercer
Mercer (Signature)

Date 4/12/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Ballance.

Directions: Please include **bill number** and **motion** or **amendment number**.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO	BILL/AMENDMENT	AYE	NO
HB 286 Do Pass	X				
SB 330 BCI	X				
Conceptual #1 ³⁵⁸		X			
Conceptual #2 ³⁵⁸		X			
SB 358 BCI	X				

I authorize my vote to be matched with that of Rep. _____
for any amendments proposed on this date.

Rep. [Signature]
Regier (Signature)

Date 4/12/19



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

AUTHORIZED COMMITTEE PROXY 66TH LEGISLATIVE SESSION

I request to be excused from the Appropriations Committee.

I desire to leave my proxy vote with Rep. Lynch.

Directions: Please include bill number and motion or amendment number.

Example: HB 123 Do Pass, HB012301.AJJ, HB123 Do Pass as Amended, HB 345 Table.

BILL/AMENDMENT	AYE	NO	BILL/AMENDMENT	AYE	NO
HB 286 OP	X				
HB 286 OP	X				
HB 286 OP	X				
SB 330 BCI	X				
SB 358 BCI		X			
conceptual #1	X				
conceptual #2	X				

I authorize my vote to be matched with that of Rep. Lynch
for any amendments proposed on this date.

Rep. [Signature]
(Signature)

Date 4-12-19

Windy Boy



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

APPROPRIATIONS COMMITTEE

ROLL CALL VOTE

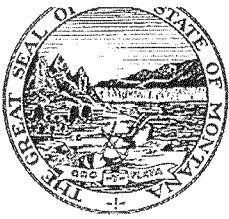
BILL NUMBER SB 358

DATE 4/12/19

MOTION Be Conceptually Amended

NAME	AYE	NO	PROXY
REP. BARTEL, VICE CHAIR		X	X
REP. JONES, VICE CHAIR		X	
REP. LYNCH, VICE CHAIR	X		
REP. ERIC MOORE		X	X
REP. KEANE	X		
REP. RYAN	X		
REP. HAMILTON	X		
REP. HOPKINS		X	X
REP. READ		X	
REP. WOODS	X		
REP. WINDY BOY	X		X
REP. CAFERRO	X		
REP. DUDIK	X		
REP. BURNETT	X		
REP. REGIER		X	X
REP. PEPPERS	X		
REP. HAMLETT	X		
REP. MERCER		X	X
REP. BEDEY		X	
REP. HOLMLUND		X	
REP. BALLANCE, CHAIR		X	
REP. GLIMM, CHAIR		X	

22 MEMBERS



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

APPROPRIATIONS COMMITTEE

ROLL CALL VOTE

BILL NUMBER SB 358

DATE 4/12/19

MOTION Be Conceptually Amended

NAME	AYE	NO	PROXY
REP. BARTEL, VICE CHAIR		X	X
REP. JONES, VICE CHAIR		X	
REP. LYNCH, VICE CHAIR	X		
REP. ERIC MOORE		X	
REP. KEANE	X		
REP. RYAN	X		
REP. HAMILTON	X		
REP. HOPKINS		X	X
REP. READ		X	
REP. WOODS	X		
REP. WINDY BOY	X		X
REP. CAFERRO	X		
REP. DUDIK	X		
REP. BURNETT		X	
REP. REGIER		X	X
REP. PEPPERS	X		
REP. HAMLETT	X		
REP. MERCER		X	X
REP. BEDEY		X	
REP. HOLMLUND		X	
REP. BALLANCE, CHAIR		X	
REP. GLIMM, CHAIR		X	

22 MEMBERS



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

APPROPRIATIONS COMMITTEE

ROLL CALL VOTE

BILL NUMBER SB 358

DATE 4/12/19

MOTION Be Concurred In

NAME	AYE	NO	PROXY
REP. BARTEL, VICE CHAIR	X		X
REP. JONES, VICE CHAIR	X		
REP. LYNCH, VICE CHAIR	X		
REP. ERIC MOORE	X		
REP. KEANE	X		
REP. RYAN		X	
REP. HAMILTON		X	
REP. HOPKINS	X		X
REP. READ	X		
REP. WOODS		X	
REP. WINDY BOY		X	X
REP. CAFERRO		X	
REP. DUDIK	X		
REP. BURNETT		X	
REP. REGIER	X		X
REP. PEPPERS		X	
REP. HAMLETT	X		
REP. MERCER		X	X
REP. BEDEY	X		
REP. HOLMLUND	X		
REP. BALLANCE, CHAIR	X		
REP. GLIMM, CHAIR	X		

22 MEMBERS

MONTANA House of Representatives
Visitors Register
HOUSE APPROPRIATIONS COMMITTEE

Friday, April 12, 2019

SB 358 - Revise resort area alcoholic beverage license laws

Sponsor: **Sen. Terry Gauthier (R)**

PLEASE PRINT

[illegible]

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

MONTANA House of Representatives
Visitors Register
HOUSE APPROPRIATIONS COMMITTEE

Friday, April 12, 2019

SB 330 - Authorize sports gambling act

Sponsor: **Sen. Mark Blasdel (R)**

PLEASE PRINT

[illegible]

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.